No. 50026-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Appellee,

v.

BRIAN MCEVOY,

Appellant.

BRIEF OF APPELLANT

Kitsap County Superior Court No. 14-1-00674-6

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I. INTRODUCTION

Brian and Kara McEvoy were separating in the spring of 2014 after 19 years together, but he was having difficulty adjusting. He had already endured the loss of his career as a Kitsap County Sheriff's Office deputy, and he was now losing his family. He was also still recovering from a bad motorcycle accident for which he required surgery several months prior to repair his severed Achilles tendons. These factors culminated in a series of bizarre, aberrant, and out-of-character decisions that will forever plague him for the emotional and physical pain and suffering he caused his family.

Facing a total of 14 counts, including attempted rape in the second degree, and no satisfactory plea offer, Mr. McEvoy proceeded to trial. Kara, the victim in all but one count, provided lengthy and damning testimony, and the jury eventually convicted on 12 of the 14 counts, but acquitted on the rape charge. The jury found same household member special allegations as to nearly each count and also that Count II, second degree assault, occurred in the presence of the McEvoy's minor children.

Mr. McEvoy's then fifteen-year-old son, DM, was the victim of simple assault in the fourth degree. DM, who is almost 18, has contacted the defense in hopes of initiating formal proceedings to regain the right to have contact with his father.

At sentencing, despite a standard range of 41 to 54 months, the trial court—in the absence of written findings of facts and conclusions of

law—nonetheless sentenced Mr. McEvoy to 234 months of confinement as based upon the aggravating factor that he committed second degree assault in the presence of his minor children.

After remand from this Court for resentencing due to the trial court's error in refusing to merge the two violations of a no contact order with the felony stalking conviction, the defense recommended an aggravated exceptional sentence of 100 months and argued that the trial court had the discretion to impose any sentence—regardless of its prior sentence. The trial court—again without findings of fact and conclusions of law—rejected the proposition that it had discretion to revisit its initial sentence, noted that the issue was preserved for appeal, and imposed 214 months of confinement.

Mr. McEvoy now comes before this Court to ask for relief because the trial court: (1) neglected to enter written findings of fact and conclusions of law; (2) erred in holding that it did not possess the discretion to substantively modify Mr. McEvoy's sentence on remand; (3) failed to provide sufficient substantial and compelling justification for its imposition of an aggravated exceptional sentence and relied upon improper aggravating factors; and (4) imposed a clearly excessive sentence of 214 months.

II. ASSIGNMENTS OF ERROR AND RELATED ISSUES

ASSIGNMENTS OF ERROR

1. The trial court erred by failing to compose written findings of facts and conclusions of law supporting its imposition of an aggravated exceptional sentence at both the initial sentencing on October 13, 2014 and resentencing on January 27, 2017.

2. At resentencing, the trial court erred in finding that it lacked discretion to impose a sentence divorced and independent from its initial sentence.

3. The trial court erred by finding substantial and compelling reasons to impose an aggravated exceptional sentence at both the initial October 13, 2014 sentencing and January 27, 2017 resentencing.

4. The trial court erred by imposing a clearly excessive sentence of 234 and 214 months, respectively, of confinement where Mr. McEvoy's standard range was 41-54 months.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. At both sentencing and resentencing, the trial court imposed an exceptional sentence without entering formal written findings of fact and conclusions of law. Is remand required for the trial court to enter written findings? (Assignment of Error #1.)

2. At resentencing upon remand after this Court vacated two convictions, the trial court determined that it lacked the discretion to change Mr. McEvoy's sentence other than recalculate the sentence absent the vacated convictions. Did the trial court err in this assessment where legions of cases involve full resentencing after remand due to vacation of convictions under the merger doctrine and where this Court instructed the court to enter a sentence consistent with its opinion? (Assignment of Error #2.)

3. At both sentencing and resentencing, the trial court determined that the jury's finding of the aggravating factor that the McEvoy minor children were within sight or sound of Mr. McEvoy's second degree assault upon his wife—coupled with other, non-statutory factors—constituted substantial and compelling reasons to justify imposition of an exceptional sentence. It is unclear exactly what the children saw and/or heard, and Mr. McEvoy was convicted for assaulting his son, which was, in large part, the conduct giving rise

to the aggravator. Under de novo review, did the trial court err in concluding that the jury's finding of the aggravating factor plus the court's subjective incorporation of other invalid factors constituted sufficient substantial and compelling reasons justifying an aggravated exceptional sentence. (Assignment of Error #3.)

4. Mr. McEvoy's standard range was 41 to 54 months. The jury found only one aggravating factor—in relation to the second degree assault, which itself was no more egregious than any typical second degree assault. The trial court imposed 234 months and then 214 months on remand, with the final portion of the sentence requiring Mr. McEvoy to serve several years in the Kitsap County Jail after more than a decade in prison. Did the trial court abuse its discretion in imposing such a clearly excessive sentence? (Assignment of Error #4.)

III. STATEMENT OF THE CASE

A. THE CHARGES AGAINST MR. MCEVOY[1]

1. April 9-10, 2014: Counts I through VII

On April 9, 2014, Kara decided to inform Mr. McEvoy that she wanted a separation and was moving out of the house. When she arrived home from work, he asked why she was late. She replied that she had gone apartment shopping and told him of her plan. He became upset, and they briefly conversed before she left to meet a friend.

When she returned, he was sitting on the couch, still upset, so she went upstairs. He followed, and told her: "You're not going to bed. You're going to suck my dick." After she refused, he grabbed her, threw her onto the bed, and repeated his command to perform fellatio. She screamed, but he told her to shut up and hit her on the side of the head—

[1] The following facts are drawn primarily from State v. McEvoy, No. 46795-0-II (June 14, 2016), a copy of which is included in the Appendix as Exhibit A, and, due to the Court's truncated recitation, supplemented with references to the prior Report of Proceedings from Mr. McEvoy's initial appeal.

the first time he had ever hit her. He then hit her again, grabbed her hair, forced her head towards his crotch, and reiterated his command.

Ms. McEvoy shouted for the assistance of her children. They awoke and, as found by the jury, were within sight or sound of the assault.[2] She instructed them to call 911. Mr. McEvoy prevented DM from doing so by pulling on and tearing his shirt—which DM likened to a football "straight arm"—and he gently pushed KM aside. He got to Ms. McEvoy's phone first and smashed it.

Ms. McEvoy then ran to her car; Mr. McEvoy followed, indicating that he had somehow rigged the vehicle. While she was able to start the car and pull away, the accelerator was not working properly. He punched on the window, jumped onto the hood, punched the windshield, and continued to scream at his wife. When the vehicle stalled, he entered on the driver's side, hit her, and pushed her over to the passenger side. She honked the horn, but he threatened to kill her if she continued. He then drove for a little bit while pulling her hair and commanding oral sex.

Ms. McEvoy, in an effort to diffuse the situation, finally agreed to the demands. Mr. McEvoy, in turn, had a "moment of clarity" and ceased his assaultive behavior. He then pulled over, had Ms. McEvoy assist while he fixed the vehicle, and then they returned home.

Mr. McEvoy then left to go stay with his mother. Ms. McEvoy also decided to take the kids, leave the house, and stay with her mother.

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[2] The state conceded at sentencing on October 13, 2014, that there was no evidence that KM witnessed the assault. See Ex. B, VRP Sentencing.

As a result of the assault, Ms. McEvoy suffered a "goose egg" forehead injury, a missing chunk of hair, and bruising on her head and arm, but no broken bones or impairment of essential bodily functions. She initially was not going to report the incident, but after speaking with her brother and mother, she called 911. Later that day, officers arrested Mr. McEvoy for assault in the fourth degree. During his first appearance on April 11, 2014, the court imposed a no-contact order barring him from coming within 500 feet of Ms. McEvoy's residence.

By the time of trial and the Second Amended Information, for his acts on April 9-10, 2014, Mr. McEvoy was charged with: Count I, attempted second degree rape; Count II, second degree assault; Count III felony harassment; Count IV, unlawful imprisonment; Count V, fourth degree assault against DM; Count VI, interfering with 911 reporting; and Count VII, third degree malicious mischief for damaging the cell phone. All counts had same household special allegations, and Count II contained the special allegation that the assault occurred within sight or sound of minor children.

2. April 12, 2014 Mailbox Incident: Count VIII

On April 12, 2014, William Blaylock, a neighbor familiar with the McEvoys, saw Mr. McEvoy pull up in his truck and go to the mailbox of the family home, which was less than 500 feet from the residence. Mr. McEvoy told Blaylock that he was just checking his mail, but that he was not supposed to be there; he repeated that he was not supposed to be there.

He was arrested and charged with violation of a no-contact order, later Count VIII, with a same household special allegation.

3. May 11, 2014 Alleged Sighting: Count IX

During the night of May 11, 2014, Mother's Day, DM reported that he saw his father in the yard. After some discussion, DM—armed with a baseball bat—and Mr. McEvoy's brother-in-law—armed with a pistol—went outside to investigate, but found nothing.

After his arrest for violation of a no contact order—future Count IX—Mr. McEvoy denied being there.

4. May 13, 2014 Telephone Call: Counts X, XI, & XII

On May 13, 2014, Mr. McEvoy made a recorded call to his wife at work during which he told her that she had a short time on earth, he hoped she could live with the consequences of her actions, that he was going to find her and have one last reckoning, and other similar statements.

This call, coupled with the April 12, 2014 mailbox incident, was the basis for Count X, felony stalking.

Standing alone, the call was grounds for Count XI, violation of a no-contact order, and Count XII, felony harassment.

5. May 19, 2014 Arrest: Counts XIII & XIV

On May 19, 2014, law enforcement located and came face-to-face with Mr. McEvoy in his vehicle. Mr. McEvoy indicated that he would surrender, but fled at a high rate of speed. He eventually collided with

another officer's vehicle in a shopping mall parking lot. During arrest and search incident to arrest, officers found a firearm.

As a result, Mr. McEvoy was charged with Count XIII, attempt to elude, and Count XIV, second degree unlawful possession of a firearm.

6. Disposition of Charges

On September 18, 2014, the jury acquitted Mr. McEvoy on Count II, attempted second degree rape, and Count IX, violating a no contact order, but found him guilty on all other counts. The jury entered same household special verdicts on all applicable counts and found that the second degree assault was within sight or sound of the victim's children.

B. SENTENCING

The initial sentencing hearing occurred on October 13, 2014. See Ex. B. The state recommended an aggravated exceptional sentence of nearly 15 years of confinement while the defense proposed a standard range sentence between 41 and 54 months. Despite Mr. McEvoy's lack of criminal history, honorable service in the Marines, decade in law enforcement, college education, and age of 45 at the time, the court imposed a sentence of 234 months (over 19 years) of imprisonment, nearly five times the top of the standard range.

In arguing against an exceptional sentence, the defense acknowledged the jury's finding of the aggravating factor that the second degree assault occurred within sight or sound of the victim's minor children under RCW 9.94A.535(3)(h)(ii), but noted that such finding

merely permitted the court to impose an aggravated exceptional sentence. See RCW 9.94A.535; RCW 9.94A.537(6) (requiring that a court find "substantial and compelling" reasons to justify an exceptional sentence in additional to an aggravating factor). The state conceded that there was no evidence that KM actually witnessed the assault, Ex. B. at 10, and Mr. McEvoy was convicted of fourth degree assault to his actions as to his son. The aggravator is thus duplicative of conduct for which Mr. McEvoy was already facing punishment.

The defense further highlighted that the majority of Mr. McEvoy's assaultive behavior occurred away from the children outside in the yard and in the vehicle. What the children actually witnessed was, therefore, within the heartland of similar domestic violence assaults and did not constitute a substantial and compelling reason justifying imposition of an exceptional sentence.

When the defense attempted to summarize its position, including mention of plea negotiations, the court sustained the state's objections on seeming relevance grounds. Ex. B at 20. The court also stated its belief that Mr. McEvoy would receive 50% "good time." Id. at 26.

The court pronounced: "I do find and I do honor the jurors' aggravating circumstance that the children were present during the Assault in the Second Degree. And I do find that the standard range sentence does not accurately reflect the nature of the criminal conduct in which the Defendant engaged, so I will impose an exceptional sentence up." Id. at

27. While the court found Mr. McEvoy's acceptance of responsibility genuine, it nevertheless concluded that he "presents a heightened security risk for having committed crimes" and created great havoc to the community when all he meant to do was scare his wife. Id. at 26-29.

The court then delineated its sentence: 10 years, the statutory maximum, on the second degree assault count; 54 months, the top of the standard range, for the stalking count, to run consecutively; all other felonies to run concurrently; and 364 days on each of the five gross misdemeanors to run consecutively. Id. at 33-34. The court then expressed its desire to impose a lifetime no contact between Mr. McEvoy and his family. Id. at 34. When defense counsel pointed out that the court did not have jurisdiction to impose a lifetime prohibition, the court rejoined: "There is a remedy, Counsel. And if I'm wrong, the Court of Appeals will tell me what my jurisdiction is." Id.

Only when the state interjected did the court relent. Id. at 35.

The court clarified: "Then ten years it is. My intent would be for much longer, if I could." Id. Mr. McEvoy replied: "Thanks." Id. The Court countered: "That's contemptuous, Mr. McEvoy. You can always add on to the sentence, if you wish." Id.

In the end, the court imposed 234-months minus five days and required Mr. McEvoy to spend five full years in the Kitsap County Jail *after* serving nineteen years in prison.

C. APPEAL AND DISCRETIONARY REVIEW

In an unpublished decision filed on June 14, 2016, Division Two rejected Mr. McEvoy's claims on direct appeal that reversal was required, but remanded for resentencing in which the two no contact order violations would merge with felony stalking. The Court held: "We vacate both of McEvoy's convictions for violating a no contact order and remand for resentencing consistent with this opinion. We affirm McEvoy's other convictions." McEvoy, supra.

Mr. McEvoy then sought discretionary review by the Supreme Court of the issues raised upon direct appeal. The court entered an Order terminating review on November 2, 2016.

Division Two entered its Mandate on November 14, 2016.

D. RESENTENCING/ MOTION TO MODIFY THE JUDGMENT AND SENTENCE

The trial court conducted resentencing on January 27, 2017. See Ex. C, VRP of Motion Hearing.

The defense argued that because Division Two vacated two of the convictions, Mr. McEvoy was free to request any sentence that was appropriate, and recommended 100 months. Id. at 3-4.

The court understood that whether she considered the vacated counts in imposing the exceptional sentence, which she did not think she did, was relevant to the defense contention. Id. at 8. The state then

offered: "I would hope that there were findings of fact for the exceptional sentence." The defense replied that it could not locate any. Id.

The court opined that it did not have the discretion to disregard its prior pronouncement, and was concerned because Mr. McEvoy failed to raise any sentencing issues on direct appeal. The court cited to State v. Shove, a case from 1989, for the proposition that it did not have the jurisdiction to modify the sentence. Id. at 18-21. The parties then discussed sentence modification under the Sentencing Reform Act (SRA), but seemed to ignore the Mandate, which required modification. The court finally concluded that Mr. McEvoy preserved the issue for appeal, but that it would impose 214 months of confinement. Id. at 26-27.

IV. ARGUMENT

A. REMAND IS REQUIRED BECAUSE THE TRIAL COURT TWICE FAILED TO ENTER WRITTEN FINDINGS TO SUPPORT ITS IMPOSITION OF AGGRAVATED EXCEPTIONAL SENTENCES

Based upon explicit statutory directive and recent, unequivocal guidance from our Supreme Court, remand is required due to the trial court's failure to enter formal written findings of fact justifying its imposition of aggravated exceptional sentences.

In State v. Friedlund, the Court determined that an on-the-record oral ruling may not substitute for the statutorily required written findings when a trial court imposes an exceptional sentence. 182 Wn.2d 388, 390,

341 P.3d 280 (2015). The appropriate remedy is remand for entry of written findings. Id.

Friedlund was a consolidated appeal involving two cases in each of which the jury convicted the defendant and found aggravating circumstances. At sentencing, each court imposed aggravated exceptional sentences with oral, on-the-record explanations of their reasoning for deviating from the standard range. Id. The controlling statute, however, is unambiguous: "Whenever a sentence outside the standard range is imposed, the trial court *shall* set forth the reasons for its decision in *written* findings of fact and conclusions of law." Id. at 390-91 (quoting RCW 9.94A.535) (adding emphasis).

The Court concluded that because neither court entered written findings prior to appeal, remand was required. Id. at 391. As the Court reasoned: "We hold that the SRA's written findings provision requires exactly that—*written* findings. Permitting verbal reasoning— however comprehensive—to substitute for written findings ignores the plain language of the statute" and "would also deprive defendants of the finality accorded by the inclusion of written findings in the court's formal judgment and sentence." Id. at 394.

The Court highlighted that an oral or memorandum opinion has no final or binding effect unless formally incorporated into the findings, conclusion, and judgment. Id. at 394-95 (citations omitted). A written judgment and sentence, by contrast, is a final, appealable order. Id. at 395.

The Court then noted that a superior court's authority to modify a judgment is limited by CrR 7.8 and RAP 7.2.(e) whereas oral rulings are not subject to the same constraints. Id.

As this case is nearly indistinguishable on this issue—the jury found Mr. McEvoy guilty and found an aggravating factor and the court imposed an exceptional sentence without composing written findings—remand is likewise mandated.

B. THE TRIAL COURT POSSESSES/POSSESSED DISCRETION TO IMPOSE ANY APPROPRIATE SENTENCE ON REMAND

Upon remand for entry of written findings—as well as on previous remand for resentencing after this Court vacated two of Mr. McEVoy's convictions—the trial court possesses/possessed the discretion to craft any sentence appropriate for the circumstances.

In Friedlund, supra, an issue was whether the Court would accept the states' motions to supplement the appellate record. In one of the cases, the trial court belatedly composed written findings while in the other, the court recognized its limits and refused to make such findings, but the state drafted its own written findings. 182 Wn.2d at 393. The Friedlund Court rejected both submissions. Id. at 395-96. The Court also vacated the belated written findings with instructions that the trial court could enter the same or different findings. Id. at 397. And, as stated above, the Court specifically noted that an oral pronouncement has little bearing unless specifically incorporated into the judgment and sentence.

It thus logically follows that the court had discretion to modify its sentence in the absence of written findings.

There are, moreover, innumerable cases in which trial courts were directed to resentence after remand due to vacation of a different conviction.

In State v. Davis, for example, the Court held that the defendant's two convictions for assault in the second degree merged with his two convictions for kidnapping in the second degree and remanded for resentencing. 177 Wn.App. 454, 311 P.3d 1278 (2013). While the Court disagreed that it was required to halve the defendant's sentence, it nevertheless remanded for resentencing because the trial court had imposed no time for the substantive offenses (as opposed to the deadly weapon enhancements, which likewise had to be vacated) and because it was unclear how the court would have sentenced the defendant had it found merger. Id. at 465 n.11; see, e.g., State v. Kier, 164 Wn.2d 798, 194 P.3d 212 (2008) (finding that second degree assault conviction merged into first degree robbery and remanding for resentencing)

Here, in like manner, while the court did not believe that it considered the vacated counts in imposing an exceptional sentence, Division Two ordered resentencing consistent with its opinion. Such language is unequivocal: the trial court was obligated to resentence Mr. McEvoy without any heed to the vacated counts and, seemingly, without any heed to the prior sentence.

While the trial court in State v. Tili resentenced the defendant to an aggravated exceptional sentence after remand—the opposite of the current proposition—it nevertheless significantly modified the defendant's sentence after the appellate court remanded for resentencing. 148 Wn.2d 350, 60 P.3d 1192 (2003). The Court further explained that a trial court "cannot enter an amended judgment after rethinking the case, unless the amended judgment is supported by the record." Id. at 360.

The case law thus seems relatively clear that a trial court possesses ample discretion to craft an appropriate sentence upon remand due to vacation of a conviction that should have been merged so long as the record supports such modification.

C. REVIEW PURSUANT TO RCW 9.94A.585(4)

Where there are substantial and compelling reasons, a sentencing court may impose an exceptional sentence outside of the standard range. RCW 9.94A.535. The reasons must relate to the crime and make it "more egregious" than is typical for that type of crime. State v. Gaines, 121 Wn.App. 687, 697-98, 90 P.3d 1095 (2004). An exceptional sentence, therefore, is proper solely when "the circumstances of the crime distinguish it from other crimes of the same statutory category." State v. Murray, 128 Wn.App. 718, 722, 116 P.3d 1072 (2005).

Pursuant to RCW 9.94A.585(4), its predecessor, and years of case law, to reverse an exceptional sentence outside of the standard range, the reviewing court must find that (1) the reasons supplied by the sentencing

court are not supported by the record under a clearly erroneous standard; (2) such reasons do not justify an exceptional sentence as a matter of law under de novo review; or (3) the sentence is clearly excessive (or too lenient) under an abuse of discretion standard. Murray, supra, at 722-23.

Here, given that jury found that Mr. McEvoy committed second degree assault within sight or sound of his minor children, which the trial testimony supports, there is substantial evidence to support this reason.

But, the mere fact that the jury found an aggravating factor does not end the inquiry. RCW 9.94A.535 states: "The court *may* impose a sentence outside of the standard range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence." (italics added). RCW 9.94A.537(6) likewise provides: "If the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence, the court *may* sentence the offender pursuant to RCW 9.94A.535 … if it finds, considering the purposes of this chapter, that the facts found are substantial and compelling reasons justifying an exceptional sentence." (italics added).

The purposes of the chapter include ensuring that punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history and that such punishment is commensurate with punishment imposed upon others committing similar offenses. RCW 9.94A.010(1) & (3); see State v. Ritchie, 126 Wn.2d 388, 391, 894 P.2d

1308 (1995) ("It is important to note that the trial court, when deciding to impose an exceptional sentence, is directed specifically to consider the purpose of the SRA.").

Mr. McEvoy contends that the fact that he assaulted his wife within sight or sound of their minor children does not constitute a substantial and compelling reason to impose an aggravated exceptional sentence in this case. Rather, there is little to distinguish the assault—notwithstanding the relative lack of bodily injury inflicted in comparison to other second degree assaults—from other similar types of second degree assaults. Note, too, that the trial court's lack of written findings makes preparation of this challenge the sentence as well as this Court's review more difficult.

Reversal is thus required after this Court's de novo review.

Finally, although Mr. McEvoy's standard range was 41 to 54 months, the trial court initially imposed 234 months and then imposed 214 months on remand. As the trial court abused its discretion in meting out such draconian and clearly excessive sentences, reversal and remand for resentencing is required.

1. The Trial Court Failed to Identify Sufficient Substantial and Compelling Reasons to Impose an Aggravated Exceptional Sentence

Given that the trial court failed to delineate sufficient substantial and compelling justification to impose an exceptional sentence, remand for resentencing within the standard range is required.

To determine whether the trial court relied upon sufficient grounds to justify an exceptional sentence, a reviewing court employs a two-part test: (1) the trial court may not rely upon factors necessarily considered by the Legislature in establishing the standard range and (2) the aggravating factor must be "sufficiently substantial and compelling to distinguish the crime in question from others in the same category." State v. Ha'mim, 132 Wn.2d 834, 840, 940 P.2d 633 (1997). A trial court's subjective determination that the standard ranges set by the SRA are unwise or fail to adequately advance the goals of the SRA, by contrast, is not a substantial and compelling reason. State v. Hodges, 70 Wn.App. 621, 624, 855 P.2d 291 (1993). The guidelines, finally, must be applied "equally to offenders in all parts of the state, without discrimination as to any element that does not relate to the crime or the previous record of the defendant." Id. (quoting RCW 9.94A.340).

A. The Sole Aggravating Factor that Minor Children were within Sight or Sound of the Assault Does Not Constitute a Substantial and Compelling Reason to Justify Imposition of an Exceptional Sentence

While the jury may have found that the assault occurred within sight or sound of the McEvoy's minor children, it is unclear exactly what KM saw or heard, and Mr. McEvoy was convicted for his behavior against DM. That was the extent of the children's involvement—Mr. McEvoy gently pushed KM on his way to destroy Ms. McEvoy's cellphone and pushed DM aside and tore his short in a "straight arm" football-style

maneuver. This conduct basically encompasses the conduct described in the aggravating factor and for which Mr. McEvoy is facing a sentence of approximately 18 years, nearly four times his standard range.

Despite the lack of serious bodily damage or any sort of weapon, Mr. McEvoy was convicted of assault in the second degree. The aggravating factor, though, does not significantly distinguish this case from countless other domestic violence cases where the children witness far worse than here. As the state conceded at the initial sentencing, there is no evidence that KM saw Mr. McEvoy assault her mother, and it is unclear what she heard. DM witnessed part of the assault and was the victim in a charged count. Neither child, however, witnessed any of the events in the yard or in the car, and when their parents returned, the violent behavior had passed. In the overall scheme of domestic violence prosecutions, then, this was a relatively common situation rather than a substantial and compelling reason to depart from the standard range.

Under the requisite two-part test, the trial court thus improperly both relied upon factors already considered by the Legislature and found the rather ordinary circumstances of the assault as somehow sufficiently substantial and compelling to warrant an exceptional sentence. This is error mandating reversal.

B. Other Insufficient Considerations

The trial court repeatedly stressed its opinion that Mr. McEvoy is a risk for recidivism and used this as a basis to impose the aggravated

exceptional sentence. But, "It is well-established that the risk of re-offense is not a substantial and compelling reason for an exceptional sentence because protection of the public has already been considered by the Legislature in computing the presumptive standard range." State v. Kinneman, 120 Wn.App. 327, 347, 84 P.3d 882 (2004); see also State v. Halgren, 137 Wn.2d 340, 346, 971 P.2d 512 (1999) ("Future dangerousness may not … be relied upon to impose an exceptional sentence in nonsexual offense cases.").

Additionally, it is now axiomatic that recidivism rates are typically lower for older defendants than for younger defendants; especially, defendants "over the age of forty … exhibit markedly lower rates of recidivism in comparison to younger defendants." See United States Sentencing Commission, Measuring Recidivism: The Criminal History Computation Of The Federal Sentencing Guidelines, 12, 28 (2004), available at http://www.ussc.gov/publicat/Recidivism_General.pdf. Indeed, many courts have explicitly considered age on the ground that older defendants exhibit markedly lower recidivism rates in comparison to younger defendants. See, e.g., United States v. Vigil, 476 F.Supp.2d 1231, 1316 (D.NM 2007) (recognizing the correlation between age and the risk of recidivism as a mitigating factor); Simon v. United States, 361 F.Supp.2d 35, 40 (E.D.N.Y. 2005) ("Guidelines fail to consider that recidivism drastically declines with the defendant's age.").

The court also referenced Mr. McEvoy's ostensible impact on the community, but, again, this is an improper basis upon which to base an aggravated exceptional sentence. In State v. Bluehorse, for example, the Court rejected the trial court's finding that the defendant terrorized his neighborhood for months as grounds for an exceptional sentence. 159 Wn.App. 410, 433, 248 P.3d 537 (2011). The Court held that "community impact" is neither specifically enumerated in RCW 9.94.535 nor a substantial and compelling reason for an exceptional sentence. Id.; see also State v. Davis, 182 Wn.2d 222, 340 P.3d 820 (2014) (noting that RCW 9.94A.535(3)(r) specifically applies where there is a "destructive and foreseeable impact on persons other than the victim"). The jury, moreover, must make any such determination, which it did not.

The trial court, furthermore, specifically considered that Mr. McEvoy would receive 50% earned release time, which is not only incorrect, but also prohibited. First, Mr. McEvoy is entitled to earned early release time of a maximum of one-third of his sentence. RCW 9.94A.730(3). And, the availability of earned early release credits is irrelevant with respect to imposition of an exceptional sentence. State v. Fisher, 108 Wn.2d 419, 429 n.6, 739 P.2d 683 (1987).

The state proposed that the court take into consideration Mr. McEvoy's demeanor, which it seemed to do. Social science research reveals that demeanor is much less of an indicator of reliability than commonly believed, and also that jurors place unwarranted emphasis

upon a witness's appearance in testifying. See J. Blumenthal, A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility, 72 Neb.L.Rev. 1157-1204 (1993); O. Wellborn, Demeanor, 76 Cornell L.Rev. 1075-1105 (1991). This is, then, yet another prohibited factor.

That the trial court sustained the state's objections to defense counsel's mention of plea negotiations (see ER 1101(a)(3)); intended to impose a lifetime no contact order until the state interceded; and crafted sentences requiring Mr. McEvoy to return to the Kitsap County Jail to serve multiple years after serving 14.5 years in prison seem to further demonstrate the trial court's general bias and vindictiveness.

A trial court exceeds its authority when it relies upon reasons that do not rise to the level of substantial and compelling. State v. Ferguson, 142 Wn.2d 631, 649, 15 P.3d 1271 (2001). The remedy is remand for resentencing within the standard range. Id.

2. The Trial Court Imposed A Clearly Excessive Sentence

Even if this Court find that the trial court relied upon adequate and proper substantial and compelling reasons calling for imposition of an exceptional sentence, a sentence of 214 months is clearly excessive.

In determining whether a sentence is clearly excessive, a reviewing court asks whether the trial court abused its discretion by relying on an impermissible reason or unsupported facts or whether the sentence is so long that, in light of the record, no reasonable person would adopt the

position of the trial court. State v. Halsey, 140 Wn.App. 313, 324-25, 165 P.3d 409 (2007). While the Halsey Court then alluded to the reviewing court's plenary discretion to affirm the length of an exceptional sentence and trial court's broad discretion in setting the length of confinement, this provides scant guidance as to what constitutes a clearly excessive sentence, which seems intentional. But, there would not be a prohibition against clearly excessive sentences if the trial court has unbridled discretion as to length.

Here, the assault upon Ms. McEvoy—while reprehensible—was not markedly egregious or different from most second degree assaults involving domestic violence. The statutory maximum is 120 years. The court imposed 214 months.

An important factor to consider is that the weight of modern social science research indicates that "incarceration—imposing it at all or increasing the amount imposed—either has no significant correlation to recidivism or *increases* the defendant's likelihood to recidivate." United States v. Courtney, 76 F. Supp. 3d 1267, 1304 (D.N.M. 2014) (adding emphasis) (citing, e.g. Lin Song & Roxanne Lieb, Recidivism: The Effect of Incarceration and Length of Time Served 4–6, Wash. St. Inst. for Pub. Pol'y (Sept.1993), available at http://wsipp.wa.gov/ReportFile/1152/Wsipp_Recidivism–The–Effect–of–Incarceration–and–Length–of–Time–Served_Full–Report.pdf.

At sentencing, the state recommended just under 15 years of incarceration—including 48 months for the now vacated convictions for violation of a no contact order. The defense advocated for a sentence within the standard range. The Court imposed 234 months—almost five years greater than what the state sought. The court also attempted to further overstep its bounds by imposing a lifetime no contact order.

Given this set of circumstances, it seems clear that the trial court abused its discretion and imposed a sentence that no other reasonable person would have tailored. Remand for resentencing is thus required.

V. CONCLUSION

For the foregoing reasons, remand for resentencing is required due to the trial court's: (1) failure to compose written findings of fact and conclusions of law; (2) failure to realize that it had discretion to resentence Mr. McEvoy on prior remand from this Court; (3) faulty reliance upon considerations that do not constitute substantial and compelling reasons justifying imposition of an exceptional sentence; and (4) imposition of a clearly excessive sentence of approximately 17 years for an assault which resulted in relatively minor bodily injury and a series of aberrant and bizarre actions for which he will forever feel ashamed, embarrassed, and remorseful.

DATED this 8th day of September, 2017.

/s/ John Henry Browne
JOHN HENRY BROWNE, WSBA #4677
Attorney for Brian McEvoy

APPENDIX

EXHIBIT A

(State v. McEvoy, No. 46795-0-II (June 14, 2016)

Filed
Washington State
Court of Appeals
Division Two

June 14, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BRIAN McEVOY, Appellant.	No. 46795-0-II UNPUBLISHED OPINION

BJORGEN, C.J. — Brian McEvoy appeals his convictions for second degree and fourth degree assault, two counts of felony harassment, unlawful imprisonment, interfering with reporting domestic violence, third degree malicious mischief, two counts of violation of a no contact order, felony stalking, attempting to elude a pursuing police vehicle, and second degree unlawful possession of a firearm.

McEvoy argues that the trial court erred when it (1) admitted law enforcement testimony about their search efforts and opinion testimony about McEvoy's dangerousness or guilt; (2) admitted hotel, rental car, and airline ticket receipts found in his vehicle as adoptive admissions; (3) denied his request for a jury instruction on misdemeanor harassment as a lesser included offense to his felony harassment charge; and (4) sentenced him without merging the felony

stalking conviction with the two convictions for violation of a no contact order. He also makes several claims in his statement of additional grounds (SAG).

We hold that the trial court did not abuse its discretion in admitting the testimony about law enforcement search efforts, but do find it abused its discretion in admitting the officers' opinion testimony that amounted to characterizing McEvoy as a dangerous or guilty individual. Nonetheless, we find those errors harmless beyond a reasonable doubt because of overwhelming untainted evidence of guilt. We further hold that if admission of the receipts was erroneous, the error was harmless; that the trial court did not abuse its discretion in denying the misdemeanor harassment jury instruction; that the sentencing court erred by not merging the no contact order convictions; and that all SAG claims fail.

Accordingly, we vacate McEvoy's two convictions for violation of a no contact order and remand for resentencing reflecting that. We affirm McEvoy's other convictions.

FACTS

Brian McEvoy and Kara McEvoy[1] were married for 16 years and had two children together: DM and KM. McEvoy worked as a deputy with the Kitsap County Sheriff's Office for approximately 10 years, ending in the late 2000's.

I. APRIL 9 & 10 DOMESTIC VIOLENCE ASSAULT

On April 9, 2014, Kara arrived at the home on Fairview Lake Road that she shared with McEvoy, DM, and KM. McEvoy asked Kara why she was home "late." Report of Proceedings (RP) (Sept. 10, 2014) at 204. Kara, planning to separate from McEvoy, told him that she had

[1] We refer to Kara McEvoy by her first name to avoid confusion between her and the appellant. No disrespect is intended.

been out looking at apartments. At this, McEvoy became angry. Kara left the home for a while, but returned later that night.

When Kara came back, she found McEvoy sitting on a couch. As Kara went to her bedroom, McEvoy followed her and told her, "You're not going to bed. You're going to suck my dick." RP (Sept. 10, 2014) at 435. After she refused, McEvoy grabbed her and threw her onto the bed. He repeated several times his command to perform oral sex. Kara began screaming, but he told her to "shut up" and hit her on the side of the head twice. *Id*. at 437. He then grabbed her hair, pulling her head down to his crotch and repeating his command.

Kara screamed for DM and KM to come help. Both woke up and found McEvoy attacking Kara. Kara told them to call 911. As DM proceeded down the hall to get to a phone, McEvoy stopped him by putting his hand out on his chest, pulling down on his collar and ripping his shirt off his body. McEvoy then caught up with KM as well and pushed her aside. McEvoy got to Kara's cell phone and threw it on the floor repeatedly until it was smashed.

Kara grabbed her keys and went outside to her car. McEvoy ran after her and indicated that he had rigged the vehicle so it would not work. Kara was able to start the car, but it would only go a very limited speed. McEvoy punched on the driver's side window and then jumped on the hood of the vehicle, punching the windshield and continuing to yell at Kara. Eventually the vehicle stalled and McEvoy used a spare key to enter the driver's side of the vehicle, hit Kara in the head, and pushed her over to the passenger side. Kara honked the horn to try to get somebody's attention, but McEvoy said, "You better stop honking the horn, or I'm going to kill you," which caused her to stop honking. RP (Sept. 10, 2014) at 448. McEvoy then pulled her hair while simultaneously driving the vehicle and repeating his command for her "to suck [his] cock." RP (Sept. 10, 2014) at 449.

After a while, McEvoy pulled over and fixed the vehicle so they could return to the Fairview home. McEvoy indicated that he would kill Kara if she called the police. Nonetheless, the morning of April 10, Kara contacted the police to report the incident. As a result, a domestic violence no contact order was filed against McEvoy on April 11 barring McEvoy from coming within 500 feet of Kara's "residence."

II. APRIL 12 MAILBOX INCIDENT

On April 12, 2014, William Blaylock, a neighbor who knew McEvoy and Kara, saw McEvoy pull up in his truck and go to the mailbox, which was less than 500 feet from the Fairview home. McEvoy then contacted Blaylock, and after a brief exchange, told him, "Well, I went to the mailbox to get my mail. . . . I'm not supposed to be here." RP at 677. He repeated that he was not supposed to be there and then left. Although Kara, DM, and KM were living with Kara's mother temporarily, she still considered that home to be her "residence." RP (Sept. 10, 2014) at 492-493.

III. MAY 13 PHONE CALL

On May 13, while Kara was at work, she received a call from McEvoy that was recorded. During the phone call, McEvoy made the following statements to Kara:

> You know what Kara, you've got a very short time on this earth. You better hope somebody finds me before I find you.
> . . . .
> I just hope you can, uh, live with the consequences of what's gonna happen.
> . . . .
> I'm gonna find you, Kara. You and I are gonna have one last reckoning, I guarantee that.
> . . . .
> Hey, Kara, I'm gonna find you, that's all I gotta say.

Clerk's Papers (CP) at 403-08. Based on McEvoy's treatment of Kara in the past, she believed that he was threatening to kill her. Because McEvoy failed to appear at a scheduled court date

on the same day as this phone call, law enforcement efforts to locate McEvoy were heightened greatly.

IV. MAY 19 ARREST

On May 19, law enforcement located McEvoy's vehicle at a tavern. Raymond Fleck, an assistant chief with the United States Marshal Service, turned down an alley near the tavern and found himself face-to-face with McEvoy in his vehicle. McEvoy raised his hands as if to surrender to Fleck. When Fleck began to exit his vehicle to arrest McEvoy, McEvoy put his vehicle in reverse and began backing up. McEvoy then drove down a nearby road at a high rate of speed, and Jake Whitehurst of the United States Marshal Service, used his vehicle to block the road McEvoy was driving down. At the last moment, Whitehurst moved his vehicle out of the way so that McEvoy would not crash into it. McEvoy continued to speed down the roads until his vehicle collided with another officer's vehicle in a shopping mall parking lot.

McEvoy was arrested and he and his vehicle were searched, disclosing a firearm, which McEvoy was not allowed to possess. In McEvoy's wallet, officers located a credit card belonging to Gail McEvoy, who was McEvoy's mother.[2] Officers also found receipts for motels, a rental car, and an airline ticket.

V. PROCEDURE

Pretrial, McEvoy filed a number of motions in limine, one of which was to suppress the receipts noted above as inadmissible hearsay. The court denied this motion, finding the receipts to be adoptive admissions. The second pertinent motion in limine was McEvoy's request to suppress any testimony regarding law enforcement's efforts to search for him between the May 13 phone call and his eventual arrest on May 18. The court initially granted the motion. However,

[2] We refer to Gail McEvoy by her first name. We intend no disrespect.

after hearing more argument, the court reconsidered its position and allowed testimony regarding police search efforts of McEvoy. The trial court reasoned that testimony about the search was relevant because of McEvoy's prior law enforcement experience and ability to avoid the police with his knowledge of their techniques, which could show his consciousness of guilt. The trial court noted that the issue was "still somewhat evolving" and that it "can't micromanage the information" until witnesses began testifying. RP (Sept. 3, 2014) at 106, 113. Consistent with the limited scope of the motion in limine, McEvoy objected to many aspects of the police officers' search efforts testimony as outlined in detail below.

1. Nicole Menge's Testimony

Nicole Menge, a deputy sheriff with the Kitsap County Sheriff's office, testified that McEvoy had knowledge and experience about law enforcement's ability to investigate because of his own prior law enforcement training. Menge testified that based, in part, on the May 13 phone call, she "started to make some efforts to locate him at that time." RP (Sept. 9, 2014) at 212. She asked officers to maintain surveillance of the Fairview residence and to conduct surveillance of Kara's workplace. Menge testified that she acquired numerous cell phone records, global positioning system (GPS) data for those phones, and bank and credit card records, and that she contacted local and federal agencies and airport and rental car companies in an effort to locate him. The defense objected to this line of testimony several times, but was overruled.

2. Earl Smith's Testimony

Earl Smith, a lieutenant with the Kitsap County Sheriff's office, testified that after he heard the May 13 phone call there were "a lot more efforts [in] locating Mr. McEvoy."

RP (Sept. 12, 2014) at 700. After the defense objected and was overruled, Smith testified that upon learning that McEvoy had returned to Washington from Vermont, he became concerned and started "deploying more assets to the investigation, more detectives" and "asked other law enforcement agencies to assist." RP (Sept. 12, 2014) at 701-02. After testifying that he sent out a "statewide bulletin to all law enforcement agencies" to locate McEvoy, defense counsel objected again, which was overruled. RP (Sept. 12, 2014) at 702-03. Smith then testified that he contacted local law enforcement about the situation with McEvoy and also enrolled the help of United States Marshal Service because of their capabilities for electronic surveillance and tracking.

Smith also testified that while attempting to locate McEvoy, officers used "two-person cars because of concern for safety." RP (Sept. 12, 2014) at 705. In the context of talking about McEvoy's arrest at a motel, he stated that a special weapons and tactics team (SWAT) had been activated, but never had to be utilized because he had already been taken into custody. In regard to McEvoy possibly appearing in court, Smith testified that they "deployed some surveillance teams, in and around the courthouse. . . to see . . . if he would show up." RP (Sept. 12, 2014) at 708.

Because he did not show up, Smith recounted the numerous entities and people they contacted to ensure safety. Smith stated that the children were eventually removed from the school because he was "very, very concerned about the kids." RP (Sept. 12, 2014) at 709. He also testified that DM was "put in a patrol car, taken from the school, while [police] had [a] surveillance team watching, in case something would happen . . .[t]his was very serious what was going on." RP (Sept. 12, 2014) at 709. Smith also testified about how they protected Kara

and how they had surveillance teams around her work place. He testified that a plain-clothes detective drove Kara's vehicle around to ensure that McEvoy was not following that vehicle.

3. Fleck's and Whitehurst's Testimony

Whitehurst and Fleck were among those assigned to McEvoy's case. Whitehurst testified that, as part of the United States Marshal's violent offender task force, his role was to apprehend wanted fugitives with felony warrants, "typically a violent or sex offense type crime, imminent threat type situation . . . like, we know that great bodily injury and/or death is likely to occur or is imminent, if this person is not apprehended." RP (Sept. 15, 2014) 727-28. Fleck gave a similar description of the violent offender task force, but also stated that they are "responsible for apprehending, for lack of a better term, the worst of the worst." RP (Sept. 15, 2014) at 793. When Fleck discussed his decision on whether to pursue McEvoy during the May 18 incident, he testified: "I determined that had he not been brought into custody, he was going to kill his wife." RP (Sept. 15, 2014) at 809. Defense counsel objected to this statement, which was overruled.

4. Verdicts

Based on the testimony of these law enforcement officers, Kara, DM, and others, the jury found McEvoy guilty of second degree and fourth degree assault, two counts of felony harassment, unlawful imprisonment, interfering with reporting domestic violence, third degree malicious mischief, two counts of violation of a no contact order, felony stalking, attempting to elude a pursuing police vehicle, and second degree unlawful possession of a firearm.[3] McEvoy appeals.

[3] McEvoy was acquitted of second degree attempted rape and one count of violation of a no contact order. The jury rendered special verdicts on all convictions that McEvoy and Kara were members of the same family or household. The jury also returned an additional special verdict on the second degree assault conviction that it had been "committed with the sight or sound of the victim's children." CP at 167.

ANALYSIS

I. LAW ENFORCEMENT TESTIMONY

McEvoy argues that the testimony from Smith, Menge, Fleck, and Whitehurst about locating him was irrelevant and prejudiced his ability to get a fair trial. He also argues that several statements from these officers were improper opinion testimony. We disagree as to the testimony regarding the officers' search efforts, but agree that some of their opinion testimony was improper and amounted to characterizing McEvoy as a dangerous and guilty individual. However, because we find there was overwhelming untainted evidence of guilt for each of his convictions, these errors were harmless.

1. Search Efforts Testimony

"Evidence which is not relevant is not admissible." ER 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. "The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible." *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002)).

"Evidence of flight is admissible if it creates 'a reasonable and substantive inference that defendant's departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt *or was a deliberate effort to evade arrest and prosecution*.'" *State v. McDaniel*, 155 Wn. App. 829, 853-54, 230 P.3d 245 (2010) (emphasis added) (quoting *State v. Freeburg*, 105 Wn. App. 492, 497, 20 P.3d 984 (2001)). "Our law does not define what circumstances constitute flight, so 'evidence of resistance to arrest, concealment, assumption of a false name, and related conduct are admissible' if the trier of fact can reasonably infer the defendant's consciousness of

guilt of the charged crime." *Id.* at 854 (quoting *Freeburg*, 105 Wn. App. at 497-98. "Such evidence 'tends to be only marginally probative as to the ultimate issue of guilt or innocence[, so] the circumstance or inference of consciousness of guilt must be substantial and real, not speculative, conjectural, or fanciful.'" *Id.* (alteration in original) (quoting *Freeburg*, 105 Wn. App. at 498).

McEvoy first argues that the law enforcement testimony from Menge, Smith, Whitehurst, and Fleck regarding the search efforts, as outlined above, was irrelevant and prejudicial. We disagree. McEvoy missed a court appearance on May 13, which resulted in the issuance of bench warrants for his arrest. McEvoy's threatening phone call to Kara occurred the same day. The four law enforcement officers testified about some of their search efforts in trying to find McEvoy before his eventual arrest on May 18. The trial court allowed this evidence primarily because McEvoy was a trained police officer for 10 years, who would be aware of the current techniques that law enforcement would employ to capture him. Therefore, the jury could have inferred that McEvoy was conscious of his guilt and that his actions were a "'deliberate effort to evade arrest and prosecution.'" *McDaniel*, 155 Wn. App. at 854 (quoting *Freeburg*, 105 Wn. App. at 497).

McEvoy also argues that the trial court abused its discretion because it did not find that any probative value of the search efforts evidence was substantially outweighed by its unfair prejudice. ER 403. Although it is arguable that some of the search efforts evidence may have been cumulative, the probative value is substantial given McEvoy's extensive experience as a police officer. The court did not abuse its discretion.

McEvoy finally contends that the trial court's refusal to sustain his multiple objections further amplified the prejudice. He objected several times during Menge's testimony, but the

trial court overruled the objections based on its pretrial ruling admitting testimony about the officers' search efforts. The rest of the overruled objections were in a similar vein. Even if the trial court did not properly sustain some of the objections, McEvoy does not show that any potential prejudice from this evidence substantially outweighed its probative value.

Accordingly, we hold that the trial court did not abuse its discretion in admitting the search efforts testimony.

2. Improper Opinion Testimony

McEvoy next argues that Fleck's and Whitehurst's opinion testimony was improper because it essentially characterized him as a dangerous and guilty individual. We agree.

"Opinions on guilt are improper whether made directly or by inference." *State v. Quaale*, 182 Wn.2d 191, 199, 340 P.3d 213 (2014). "Impermissible opinion testimony regarding the defendant's guilt may be reversible error because such evidence violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury." *Id.* In determining whether statements are impermissible opinion testimony, the trial court will consider the circumstances of the case, including the following factors: "(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact." *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (internal quotation marks omitted) (quoting *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)). Some areas, however, are clearly inappropriate for opinion testimony in criminal trials, including personal opinions as to the defendant's guilt, the intent of the accused, or the veracity of witnesses. *Quaale*, 182 Wn.2d at 200. Police officers' opinions on guilt particularly have low probative value because their area

of expertise is in determining when an arrest is justified, not in opining when there is guilt beyond a reasonable doubt. *Montgomery*, 163 Wn.2d at 595.

McEvoy cites several instances of improper opinion testimony, including Fleck's and Whitehurst's testimony that they are involved in cases with imminent threats of violence in which "great bodily harm or death is likely to occur" or cases with people that are the "worst of the worst." Br. of Appellant at 24; RP (Sept. 15, 2014) 727-28, 793. In the most questionable of these comments, Fleck stated, "I determined that had he not been brought into custody, he was going to kill his wife." Br. of Appellant at 24; RP (Oct. 15, 2014) at 809. We agree that these comments were improper.

Fleck's and Whitehurst's comments about the types of cases in which they are involved generally implied McEvoy's guilt. The jury could have inferred that Fleck and Whitehurst only got involved in McEvoy's case because there was a high probability that he was going to severely harm or kill Kara. Fleck's comment that they only get involved in the "worst of the worst" cases amplifies the impropriety. Because testimony from police officers carries an aura of reliability, *Montgomery*, 163 Wn.2d at 595, the jury may have been influenced by these improper comments when determining whether McEvoy threatened to kill his wife, whether he severely assaulted her during the April 9/10 incident, and whether he was stalking or harassing her.

We also agree that Fleck's comment as to his state of mind, where he stated, "I determined that had he not been brought into custody, he was going to kill his wife" was improper. RP at 809. This comment is similar to the one in *State v. Edwards*, 131 Wn. App. 611, 613, 128 P.3d 631 (2006), where a police detective testified that a confidential informant had told him the defendant was dealing crack cocaine, which prompted his subsequent

investigation into the defendant. The *Edwards* court held that this evidence was improper substantive evidence of the defendant's guilt because the defense never challenged why the police detective began investigating the defendant. *Id.* at 614-15. Similar to *Edwards*, Fleck's state of mind when he decided to further pursue McEvoy was irrelevant because the defense never challenged why Fleck continued to pursue him. Instead, the jury could have believed this to be substantive evidence of McEvoy's guilt of the charged offenses. *See also State v. Aaron*, 57 Wn. App. 277, 279-81, 787 P.2d 949 (1990) (officer's "state of mind" that the dispatcher had told him the burglar had a jean jacket was irrelevant and was only offered to be substantive evidence of the defendant's guilt); *State v. Johnson*, 61 Wn. App. 539, 545, 811 P.2d 687 (1991) (officer's testimony as to information from a confidential informant recorded in a search warrant affidavit was improper to admit as "state of mind" evidence since the defendant did not challenge the validity or execution of the search warrant.).

Fleck's and Whitehurst's testimony regarding the types of cases they get involved in, coupled with Fleck's opinion that McEvoy was going to kill his wife, reasonably implied that McEvoy was a dangerous person who was guilty of the charged crimes. Accordingly, we hold these comments were improper.[4]

[4] McEvoy also argues that the prosecutor's references to Fleck's and Whitehurst's opinion testimony was improper. Even if improper, McEvoy never objected to the prosecutor's comments and a curative instruction could have been remedied any prejudice. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012) (when a defendant fails to object to the challenged portions of the prosecutor's argument, she or he is deemed to have waived any error unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice).

3. Harmlessness Beyond a Reasonable Doubt Due to Overwhelming Untainted Evidence

We next examine whether this evidence, though improper, was harmless beyond a reasonable doubt due to overwhelming untainted evidence. We hold that there is overwhelming untainted evidence supporting each of McEvoy's convictions.

The "overwhelming untainted evidence" test allows us to avoid reversal on merely technical or academic grounds while insuring that a conviction will be reversed where there is any reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty verdict. *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). In examining whether error is harmless beyond a reasonable doubt due to overwhelming untainted evidence, we examine both the State's evidence and the defendant's evidence controverting the State's case. *State v. Watt*, 160 Wn.2d 626, 639, 160 P.3d 640 (2007). We look only at the evidence that was properly admitted at trial to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. *Id.* at 636. If the State's and defendant's evidence are directly in dispute on a charge, it is less likely for us to uphold the conviction due to overwhelming untainted evidence. *See State v. Damon*, 144 Wn.2d 686, 694-95, 25 P.3d 418 (2001). Because we find overwhelming untainted evidence of guilt, we uphold all of McEvoy's convictions.

First, we uphold the second degree assault conviction against Kara based on the April 9/10 incident. Second degree assault requires the State to prove that the defendant "[i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm" on a person. RCW 9A.36.021(1)(a). Kara's testimony, her brother's testimony, and photographic evidence[5] supply overwhelming untainted evidence to uphold the conviction.

[5] At trial, photographs depicting Kara's injuries were admitted. They showed Kara with a lump on her head, bruises, and a chunk of her hair missing that took several months to grow back.

Second, we uphold the fourth degree assault conviction for conduct against DM during the April 9/10 incident. Fourth degree assault requires the State to prove that the defendant "assault[ed] another." RCW 9A.36.041(1). Kara's and DM's testimony together supplies overwhelming evidence supporting this conviction.

Third, we uphold the felony harassment conviction against Kara based on the April 9/10 incident. A person is guilty of misdemeanor harassment if.

> (a) Without lawful authority, the person knowingly threatens:
> (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or
> . . .
> (iv) Maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety; and
> (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.

RCW 9A.46.020(1). A person is guilty of felony harassment if "the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person." RCW 9A.46.020(2)(b)(ii). Kara testified that McEvoy repeatedly threatened to kill her throughout the incident, saying, for example, "Hey, bitch, I'm going to come fucking kill you." RP at 445, 448, 455. Although the evidence for this conviction rested solely on Kara's testimony, McEvoy presented no evidence to controvert this portion of her testimony. Kara's testimony therefore supplies overwhelming evidence, and we uphold this conviction.

Fourth, we uphold the unlawful imprisonment conviction against Kara based on the incident on April 9/10. "A person is guilty of unlawful imprisonment if he or she knowingly restrains another person." RCW 9A.40.040(1). Kara testified that once McEvoy entered the vehicle, he beat her on the head and then pulled her hair so she could not leave the vehicle. Similarly to the felony harassment conviction discussed above, the unlawful imprisonment

conviction rested solely on Kara's testimony. However, McEvoy presented no evidence to controvert that testimony. Accordingly, we uphold this conviction.

Fifth, we uphold the interfering with reporting domestic violence conviction based on the April 9/10 incident. Interfering with reporting domestic violence requires the State to prove that the defendant "[c]ommit[ed] a crime of domestic violence, as defined in RCW 10.99.020" and "[p]revent[ed] or attempt[ed] to prevent the victim of or a witness to that domestic violence crime from calling a 911 emergency communication system." RCW 9A.36.150. Kara's and DM's testimony supplies overwhelming evidence, and we therefore uphold this conviction.

Sixth, we uphold the third degree malicious mischief conviction based on the April 9/10 incident. Third degree malicious mischief requires the State to prove that the defendant "[k]nowingly and maliciously cause[d] physical damage to the property of another." RCW 9A.48.090. Kara's and DM's testimony and the photographic evidence supply overwhelming evidence of this, and we therefore uphold this conviction.

Seventh, we uphold the no contact order violation based on the April 12 mailbox incident. Violation of a no contact order requires the State to prove that an order was granted and the respondent or person to be restrained knows of the order. RCW 26.50.110(1)(a). It also requires the State to show a violation of one of the order's restraint provisions, which could include, "prohibiting contact with a protected party," "excluding the person from a residence," or "prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location." RCW 26.50.110(1)(a)(i)-(iii). The State submitted a no contact order filed on April 11 that fulfilled the required elements above. Blaylock's testimony provided overwhelming evidence that McEvoy knew of the order, and Kara's, Blaylock's, and Menge's

testimony supplied overwhelming evidence that he violated it. Therefore, we uphold the conviction.[6]

Eighth, we uphold the no contact order violation based on the May 13 phone call. The phone call was recorded and played for the jury, Kara testified that she received the phone call, and McEvoy admitted to making it. There was also a no contact order that was in place prohibiting McEvoy from contacting Kara. We find overwhelming evidence, and therefore uphold this conviction.

Ninth, we uphold the felony harassment conviction based on the May 13 phone call. The admitted May 13 phone call, Kara's testimony, admitted ER 404(b) evidence, and Menge's testimony supply overwhelming evidence of this offense, and we uphold this conviction.[7]

Tenth, we uphold the attempting to elude police vehicle conviction based on the May 19 incident. Attempting to elude a police vehicle requires the State to prove that a person "willfully fail[ed] or refuse[d] to immediately bring his or her vehicle to a stop and . . . dr[ove] his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop." RCW 46.61.024(1). Fleck's and

[6] McEvoy also argues, under the guise of a sufficiency of the evidence challenge, that the no contact order imposed after the April 9/10 incident is "ambiguous as applied" and did not give "fair notice" because the term "residence" is not specified with a specific address in the no contact order. Br. of Appellant at 37-38; CP at 378-79. Both parties ask us to define "residence." We decline to do so, however, as we only need to find that there is overwhelming evidence that McEvoy believed he came within 500 feet of Kara's "residence" when he went to the mailbox to check his mail—not what the legal definition of residence in the no contact order would be. Finding overwhelming evidence that McEvoy knew the Fairview home was Kara's residence as understood from the no contact order, we decline to address this issue further.

[7] McEvoy argues that there is insufficient evidence to support his felony stalking conviction. Because we hold that there was overwhelming untainted evidence of this conviction, we necessarily find the evidence sufficient as well.

Whitehurst's testimony as well as photographic evidence supply overwhelming evidence of guilt, and we uphold the conviction.

Eleventh, we uphold the second degree unlawful possession of a firearm conviction. Second degree unlawful possession of a firearm requires the State to prove that a person "owns, has in his or her possession, or has in his or her control any firearm . . . (ii) [d]uring any period of time that the person is subject to a [protective] order . . . that:

> (A) Was issued after a hearing of which the person received actual notice, and at which the person had an opportunity to participate;
> (B) Restrains the person from harassing, stalking, or threatening an intimate partner of the person or child of the intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
> (C)(I) Includes a finding that the person represents a credible threat to the physical safety of the intimate partner or child; and
> (II) By its terms, explicitly prohibits the use, attempted use, or threatened use of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury.

RCW 9.41.040(2)(a).[8] The State submitted a no contact order to the jury which satisfies the elements stated above. Testimony and photographic evidence established that a .38 caliber colt revolver was found in McEvoy's vehicle after he was arrested. Therefore, finding the elements met, we uphold this conviction due to overwhelming untainted evidence.

Twelfth, we uphold the felony stalking conviction. A person commits the crime of stalking if, without lawful authority

> (a) He or she intentionally and repeatedly harasses or repeatedly follows another person; and

[8] We note that the date of the commission of this crime was May 19, 2014. The current version RCW 9.41.040 was not in effect until June 12, 2014. McEvoy was charged based on the current version of RCW 9.41.040. The jury was also instructed on the current version of RCW 9.41.040; McEvoy did not object. Thus, the current version of RCW 9.41.040 became the law of the case, *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998), and we follow that in assessing the second degree unlawful possession of a firearm conviction.

> (b) The person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person. The feeling of fear must be one that a reasonable person in the same situation would experience under all the circumstances; and
>
> (c) The stalker either:
>
> (i) Intends to frighten, intimidate, or harass the person; or
>
> (ii) Knows or reasonably should know that the person is afraid, intimidated, or harassed even if the stalker did not intend to place the person in fear or intimidate or harass the person.

RCW 9A.46.110. The statute elevates the crime of stalking from a gross misdemeanor to a class B felony when in violation of a no contact order protecting the person being stalked. RCW 9A.46.110(5)(b)(ii). The State must show that on "at least two separate occasions, [the defendant] harassed or followed [the victim] in violation of a protection order." *State v. Johnson*, 185 Wn. App. 655, 670, 342 P.3d 338, *review denied*, 184 Wn.2d 1012 (2015). Harassment is defined, in part, as "a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose." RCW 10.14.020(2); RCW 9A.46.110(6)(c). Following is defined, in part, as "deliberately maintaining visual or physical proximity to a specific person over a period of time." RCW 9A.46.110(6)(b).

McEvoy's felony stalking conviction rested on the no contact order violations from the April 12 mailbox incident and May 13 phone call. Clearly, overwhelming untainted evidence exists to support the May 13 phone call as an episode of following or harassing. However, whether the record contains overwhelming untainted evidence that McEvoy checked his mail on April 12 to "harass" or "follow" Kara is a much closer question.

McEvoy submitted evidence that he intended to pick a time where he knew nobody would be at the residence. Kara's absence at the residence when McEvoy picked up his mail

corroborated his claim. On the other hand, the State's evidence showed that McEvoy admitted to violating the no contact order; that McEvoy hardly had any mail at the home mailbox and kept a separate post office box where the family's bills and bank statements would go; and that his actions during the prior April 9/10 incident circumstantially demonstrated his intent to harass or follow Kara under the guise of checking the mail. We find this evidence in the aggregate, despite McEvoy's defense, shows that the mailbox incident was an incident of following or harassing. All told, we do not see a reasonable possibility that the use of the improperly admitted evidence discussed above was necessary to reach a guilty verdict. Accordingly, like the other convictions, we uphold the felony stalking conviction.

II. ADOPTIVE ADMISSIONS

Next, McEvoy argues that the trial court abused its discretion in admitting hotel, rental car, and airline ticket receipts found in his vehicle as adoptive admissions. Assuming without deciding that the trial court erred, we find their admission harmless. "An evidentiary error is harmless unless it was reasonably probable that it changed the outcome of the trial." *In re Det. of Mines*, 165 Wn. App. 112, 128, 266 P.3d 242 (2011). Because we hold above that there was overwhelming untainted evidence of McEvoy's guilt as to each conviction as noted above, we necessarily find that it was not reasonably probable that admission of the receipts changed the outcome of the trial. Accordingly, any error in admitting these receipts was harmless.

III. LESSER INCLUDED JURY INSTRUCTION TO FELONY HARASSMENT

McEvoy argues that "[t]he trial court erred by refusing to instruct on the lesser included charge of misdemeanor harassment" to the greater offense of felony harassment. Br. of Appellant at 42. We disagree.

1. Legal Principles

A defendant is entitled to a lesser included jury instruction if two prongs are met. First, under the legal prong each of the elements of the lesser offense must be a necessary element of the offense charged. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Second, under the factual prong the evidence must support an inference that the included crime was committed. *Id.* at 448. Here, the State concedes that the legal prong is met, which we accept. *State v. C.G.*, 150 Wn.2d 604, 611, 80 P.3d 594 (2003) (observing that misdemeanor harassment with the threat to cause bodily injury is a lesser included offense to felony harassment with the threat to kill). The closer issue is whether the factual prong is met.

We review a trial court's decision regarding the factual prong for abuse of discretion. *State v. Henderson*, 182 Wn.2d 734, 743, 344 P.3d 1207 (2015). When evaluating whether the evidence supports an inference that the lesser crime was committed, we view the evidence in the light most favorable to the party who requested the instruction. *Id.* at 742. "If a jury could rationally find a defendant guilty of the lesser offense and not the greater offense, the jury must be instructed on the lesser offense."[9] *Id.* at 736.

We hold the trial court did not abuse its discretion in denying McEvoy a misdemeanor harassment instruction. The trial court properly found that a reasonable juror could only find that McEvoy's comments during the May 13 phone call were a threat to kill and placed Kara in

[9] Citing 182 Wn.2d at 748-49, n.6 (McCloud, J., dissenting), McEvoy argues that this rule violates RCW 9A.04.100(2). RCW 9A.04.100(2) states that when a crime has been proven and there exists a reasonable doubt as to which of two or more degrees he or she is guilty, the defendant shall be convicted only of the lowest degree. However, an issue of this magnitude requires much more briefing than McEvoy has provided here. *See Joy v. Dep't of Labor & Indus.*, 170 Wn. App. 614, 629, 285 P.3d 187 (2012). Therefore, we do not reach it.

reasonable fear that the threats to kill would be carried out. RCW 9A.46.020. First, no reasonable juror could find that McEvoy's comments "Kara, you've got a very short time on this earth," coupled with his later comment "I'm gonna find you, Kara. You and I are gonna have one last reckoning, I guarantee that" implied that he was only going to "cause bodily injury" and not kill. RCW 9A.46.020(1)(a), 2(b)(ii). Although McEvoy argues that these comments are "ambiguous," the implications of these two threats, along with McEvoy repeatedly telling Kara he is going to come "find" her, demonstrate that a reasonable juror could not rationally conclude that he was only planning to cause bodily injury to her. Br. of Appellant at 47.

As to whether a reasonable juror could only infer that Kara was placed in reasonable fear that the threat would be carried out, McEvoy argues that the trial court's reliance on *C.G.*, 150 Wn.2d at 611 was improper. We disagree. In *C.G.*, the victim's testimony was that he only feared bodily injury—not death—and therefore, the court reversed the defendant's felony harassment conviction. *Id.* at 607, 610. Here, the trial court found that none of Kara's testimony could have allowed a juror to reasonably infer she was only afraid of being harmed; rather, "she was only concerned that he was going to kill her." RP at 868. Indeed, Kara testified directly that McEvoy "was trying to find me and hurt me, and he was threatening . . .[t]o kill me." RP at 523. Based on that evidence, the trial court did not abuse its discretion in finding a reasonable juror could only conclude that McEvoy's threat placed her in fear for her life.

Accordingly, the trial court did not abuse its discretion in denying McEvoy the misdemeanor harassment instruction.

IV. MERGER

McEvoy argues, and the State concedes, that both convictions for violating a no contact order, which he was individually sentenced on, must be vacated because they merge with the

felony stalking conviction. We accept the State's concession and agree with McEvoy. In *State v. Parmelee*, 108 Wn. App. 702, 711, 32 P.3d 1029 (2001), Division One of our court held that a conviction for violating a no contact order must be merged if used as a basis for a felony stalking conviction. McEvoy's two no contact order violations were the basis for his felony stalking conviction, yet he was convicted of all three offenses. The entry of multiple convictions for the same offense offends double jeopardy. *State v. Knight*, 162 Wn.2d 806, 813, 174 P.3d 1167 (2008). Therefore, we vacate those convictions and remand for resentencing accordingly.

V. SAG CLAIMS

McEvoy's SAG makes several ineffective assistance of counsel claims. To prevail on an ineffective assistance of counsel claim, the defendant must show both that (1) defense counsel's representation was deficient and (2) the deficient representation prejudiced the defendant. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011), *cert. denied*, 135 S. Ct. 153 (2014). If a defendant fails to establish either prong, this court need not inquire further. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). Representation is deficient if it falls below an objective standard of reasonableness. *Grier*, 171 Wn.2d at 33.

As an initial matter, we find the record insufficient to review McEvoy's claims (1) that his first defense counsel was deficient when he advised McEvoy to leave Washington and skip a court appearance, and (2) that his trial counsel failed to listen to phone calls and provide them to the sentencing court, which would have allegedly resulted in more leniency in his sentence. If McEvoy wishes to raise these issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

McEvoy also argues that his trial counsel was ineffective for failing to retain an expert witness that would testify about his medical condition, which may have impacted the jury verdicts. Although the record contains evidence that McEvoy had surgery for a medical issue several months before the April 9/10 incident, there is also evidence that he had mostly recovered by the time the April 9/10 incident occurred. Without more evidence that he was still injured and that it may have affected his actions as related to his convictions, it was a reasonable tactic for McEvoy's counsel to not bring an expert who would not have helped his defense.

McEvoy also contends that his trial counsel was ineffective for failing to request a venue change because Kitsap County was prejudiced against him. However, this claim is without merit as defense counsel could have believed that the process of voir dire is an equally effective process for vetting jury members. *Cf. In re Pers. Restraint of Lord*, 123 Wn.2d 296, 305, 868 P.2d 835 (1994).

The rest of McEvoy's SAG, in general, argues that Kitsap County was prejudiced against him because he was an officer for 10 years. However, in the absence of any actual evidence in the record of prejudice against McEvoy stemming from his position as an officer, we find this meritless.

Accordingly, we dismiss McEvoy's SAG claims.

CONCLUSION

We vacate both of McEvoy's convictions for violating a no contact order and remand for

resentencing consistent with this opinion. We affirm McEvoy's other convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

BJORGEN, C.J.

We concur:

MELNICK, J.

SUTTON, J.

EXHIBIT B

(VRP Sentencing, October 13, 2014)

THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KITSAP

STATE OF WASHINGTON,)
)
Plaintiff,)
)
vs.) No. 14-1-00674-6
)
BRIAN McEVOY,)
)
Defendant.)

VERBATIM REPORT OF PROCEEDINGS
SENTENCING

Before the Honorable Jeanette Dalton
October 13, 2014

Port Orchard, Washington

APPEARANCES:

For the Plaintiff: CAMI G. LEWIS
Deputy Prosecuting Attorney

PHILIP A. BACUS
Deputy Prosecuting Attorney

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P R O C E E D I N G S

* * *

THE COURT: All right. Good morning. We're here for the sentencing in State v. McEvoy, but we're missing the Defendant.

MS. LEWIS: Your Honor, my understanding is he's --

THE COURT: He's what?

MS. LEWIS: Ms. Dodd called. He's on his way.

THE CLERK: Did Jen not tell you that I was going to come get you?

THE COURT: No. All right. We'll be at recess, then, until he gets here.

(Recess)

THE COURT: All right. We have Mr. McEvoy present. We are here in the State of Washington versus Brian McEvoy. We are here for sentencing. I have received the Defense sentencing memorandum, which incorporated a letter from Mr. Petix. But I also received independently a letter from Mr. Petix, which I'll ask the clerk to file. Basically, it says exactly -- it's the same thing.

I also received the State's sentencing memorandum and the attachments, as well as a CD, which I did listen to. Also, I received a number of letters that

were filed this morning. And so I believe that I'm fully informed.

Okay. So from the prosecution?

MS. LEWIS: Thank you, Your Honor.

Would you like us at the bench or here?

THE COURT: Wherever is most comfortable, Counsel.

MS. LEWIS: Your Honor, I'm trying not to be duplicative from what the Court heard in the facts of the case and the facts of the trial, as well as in the State's sentencing memorandum.

However, I do feel like we need to highlight a couple of the issues. And perhaps the most prominent in this is the Defendant has failed to take absolutely any, any responsibility. On the jail calls that the Court heard, he blames his mother for the fact that he got caught with the gun. And there's no recognition of the fact that it's not that the gun was planted in his car, but the fact that she told his brother and his brother told law enforcement that the gun was there. He takes no responsibility for having the gun.

And I understand that there's a tendency, and probably almost an expectation, that when defendants are talking to their family members, there's going to be some sort of a downplay of their own actions. But he flat out

lied to his mother. And he told his mother that, you know, Kara testified to all of these things and that there was absolutely nothing to corroborate. He told her -- he told his mother that there were no pictures of any injuries, which clearly there were. He said his son didn't corroborate anything that his mother -- that Kara had said. And he clearly did. He -- Dylan testified that he walked in while the Defendant was beating on his mother, and that is not something that he ever revealed to his own mother, to Mr. McEvoy's mother.

And that's probably the biggest concern for the State is the fact that he cannot recognize, and almost in a pathological sense, his behavior and his role in how he got here. And it is him that got him here. He consistently blames Kara for being here. And quite frankly, in our interactions with Kara, she consistently said, "I don't care what the sentence is. I just want him to leave me alone." And that was her theme throughout the whole thing.

Oftentimes, I will make comments to the Court in my sentencing hoping that maybe the Defendant will hear them and accept them. I know that that's not going to happen here. My comments are directed to the Court, because I don't think he will ever understand. The absolute refusal for him to take any responsibility I

think is crucial for the Court to consider his dangerousness to the community. He continued his behavior, after having been arrested twice for domestic violence incidents, and just flat out blatantly, on a recorded call, threatened to kill her.

And as we talked about in the trial itself, there was absolutely no reason for him to be in Washington state except for to terrorize her. And he clearly indicated that. He baited Kara to call law enforcement. And in the same way, I think he baited law enforcement to come after him. He knew that Kara would call law enforcement after getting that call. There's no way he didn't know. He was a deputy for ten years.

The theme -- well Mr. Bacus, in his opening statements, talked about the fact that this was power and control -- and there was an objection to that term -- that this is textbook domestic violence. Everything that the Defendant did even during -- before, during, and after is classic textbook.

He -- they would get into arguments, and he would threaten her with various different things. And then he would come back to apologize and try to ingratiate himself with her. He would promise her things, promise to get into treatment, promise to do better. And she believed him. They had been together for a very long

time. And he kept it together for some period of time and then would fall back into his old behaviors. And she, even on the phone call, said, "I have told you you can keep the house. You can stay with the kids. And we'll try to work this out." And he could no accept that. And as the Court knows -- well, I'm sure the Court knows that in a domestic violence situation, when a person -- when a victim makes an affirmative step to leave the situation, that's probably the most volatile point of that relationship.

So that's talking about before the incident. During the incident, Kara described and Dylan supported just an absolutely terrifying incident. And Kaitlyn describes that, somewhat, in her victim impact statement as well. The victims of this are not just Kara and Dylan. They are significantly Kaitlyn as well. She watched as her father went to grab the phone so that no one could call 911 and smash it to the ground.

The after effects of his behaviors are still constantly. If you look at the power and control wheel that everyone is trained upon, one is blaming other people. One is minimizing other people's behavior, controlling all aspects of the victim's life. And these are factors and behaviors that he exhibited, even toward the very end where he refused to even stop for law

enforcement. The -- when talking to the -- I believe it was the Acting Assistant Chief for the US Marshals, Raymond Fleck, he indicated that he was going to use this situation as a training tool for when he trained on threat assessment; that he thought that this was such a classic example and such a high threat that he was going to train his other individuals and the people that he works with to say, hey, look at this, and here's what we can learn from this.

The law enforcement in this case did a remarkable job. And quite frankly, I think that other than Kara's brother, who was there at the time -- well, let me put that aside because the jury acquitted him of that charge. But I think that law enforcement, the US Marshals Service, and especially Detective Menge, saved Kara's life. There's no doubt in my mind that the Defendant wanted to kill her and was going to do what he could to kill her. So for that reason, I thank them, and I know Mr. Bacus would thank them as well.

I want to address real quickly the Defense's sentencing memorandum and contest a couple of portions in there. I understand his argument regarding the standard range. And I, obviously, disagree with that. The standard range itself is 33 to 43 on Count 2, which is the Assault Two. However, the Court can impose up to ten

years on that count. And so that's why I reflected that in my sentencing memorandum.

Some of the specifics that I would vehemently contest is the assertion that in the criminal justice system, the married adults -- well, I guess I don't contest that, that they occasionally assault their partners when their children are present. But I don't know that I've ever seen a case where a son has to pull his father off, and the son says to the defendant, Mr. McEvoy, "Hit me instead of my mother." I can't imagine a time that I've ever seen that.

The assertion that Mr. McEvoy had a long history of public service, obviously, that's been established, having served with distinction in the Marines and the Kitsap County Sheriff's Office. We know that he was honorably discharged from the Marines. That's what we know about that. As far as the Kitsap County Sheriff's Office, he was terminated. And that is not without distinction. He was terminated from that position.

And those two -- those two careers allowed him to have the tools, the knowledge, and the ability to do everything that he did. It gave him the opportunity and the knowledge that law enforcement would track him using his cell phone, that law enforcement would track him using his own credit card, that law enforcement potentially

couldn't find the gun that he had hidden in a secret compartment, not that his mother had planted it there. He willingly took the gun.

The various letters that have been filed both by the Defense and by the -- on behalf of the victim I think are very telling. I think everybody agrees that Mr. McEvoy needs treatment. I don't think his behavior is going to change unless he gets treatment. And that includes both drug and alcohol treatment, mental health treatment, and domestic violence perpetrators treatment.

However, I think the most crucial point of this is to keep the community safe and to keep Kara safe. And I think the only way to do that is a lengthy sentence. And I recognize that the standard range, the highest standard range, is 41 to 54 months. I think that is grossly inadequate for this case. And for that reason, we are recommending the 15 years -- shortly less than 15 years, as laid out in our sentencing memorandum.

This was a case that the Defendant had methodically planned out, that he himself had taken all of the actions. And no matter how much he blames other people, whether it be for testifying against him, whether it be for reporting it to the police, whether it be his own family not coming up and saying, Kara, why are you doing this to him? He initially did take responsibility,

in that phone call that he made to Kara, when he said, "I hit you." That is the only evidence that I have seen or that has ever been presented that he's taken any responsibility for this.

The -- if I can have just a moment. One of the -- and I don't believe that I've put this phone call on the CD that I'd given court. But one of the things that he said to his mom was, when Kara testified, she was, "Oh, oh, oh, I'm so scared of him, I'm so afraid of my life." And that was the tone that he used; and that she was giving him a pouty look during her testimony. I think the Court -- I hope the Court noticed his behavior during the trial, when he appeared to have absolutely no interest in the proceedings. He scoffed when his son testified. And he is -- basically, this whole thing is a joke to him.

Again, for those reasons, I'm asking that the Court impose the recommendation that's in the sentencing memorandum. I'm obviously asking for a no contact order, both with his wife, his son Dylan, and also Kaitlyn. I understand Kaitlyn was not charged as a victim in any of this, but she certainly witnessed it, and I think that's part and parcel of the aggravator that the jury found, the children present during a DV situation. Granted, we have no evidence that she saw him beat on his wife, but she did have information that he interfered with the 911 call.

Again, we're asking that the Court follow this recommendation. As the Court can see, there are a number of people here in the courtroom. Kara is here with her mother and a good friend and her son. They both -- they've all indicated to me that they didn't necessarily want to speak. Law enforcement has informed me that they didn't want to speak. They want to rely on the statements that were filed with the Court.

THE COURT: All right. Thank you.

Mr. Weaver?

MR. WEAVER: This is obviously a difficult sentencing hearing. The Court has got a lot of discretion.

What I think is important for the Court to -- Roger Hunko sometimes says that the criminal justice system judges you by the worst day of your life. And we have here basically a month-and-a-half period, about six weeks, of spiraling downward behavior for which the Court is going to impose a sentence. And it's very easy to concentrate on those six weeks and say, Mr. McEvoy, you did this, you did that.

But I think that it's also worthwhile to take a step back. He's a 45-year-old man who grew up in New England, who went to college, who joined the Marines, came to Washington state, was hired by the Kitsap County

Sheriff's Office. And I stand by my statement that he served with distinction in the sheriff's office. I understand that he was ultimately fired. He got a DUI, refused a breath test, lost his driver's license. He couldn't continue his duties there. But I do -- to ignore the ten years he spent in the sheriff's office I think is wrong.

He has -- he comes before the Court with no prior criminal history, misdemeanor or felony. He's --

THE COURT: Did the DUI go away? What happened with the DUI?

THE DEFENDANT: The charges were dismissed.

MS. LEWIS: Your Honor, I believe it was pled down to a Negligent Driving in the Second Degree.

THE COURT: Okay.

MR. WEAVER: He -- he's not eligible for a first-time offender because Assault in the Second Degree is a violent offense. But for the fact that it's a violent offense, he'd be eligible for a first-time offender waiver. And I wouldn't ask for one on this case.

But he -- on April 8, April 9, he had an offender score of zero. And he gets arrested, charged with Assault in the Fourth Degree. I do agree with one thing that Ms. Lewis said and is supported by the data; that when domestic partners, particularly domestic

partners who have been together a long time, as was the case in this situation, when they decide to separate, there is a period of emotional behavior that can lead to irrational decisions, poor judgment decisions.

During the trial, the State made a big deal out of some 404(b) evidence of some prior fights that Brian and Kara McEvoy had had. For a 16-year marriage, 19-year relationship, the number of fights that they were able to identify I thought was relatively de minimus. Things were escalating in March. Things escalated very badly on April 9. But what precipitated that was Kara's -- Kara McEvoy's decision to leave the marriage, get an apartment. And as I stated, the data does support that that is a very sensitive time in a long-term marriage.

Mr. McEvoy did not make good decisions that night. He continued to make some poor decisions. I would submit that he was depressed and probably still is. I would submit that he was drinking too much. The State says he had no reason to be in Washington state. Well, that's not true. He was supposed to be here for a hearing on May 13. And it's a little unclear to me whether that hearing was -- whether he was going to be excused from that hearing or no. Obviously, he wasn't going to be totally excused, because the State asked for a warrant on May 13.

But for a month-and-a-half period, as he realized that his life was unraveling, that his wife was leaving him, that his relationship with his children was going to be forever altered, he made some poor decisions. And for that, and based upon the verdict of the jury, a sentence is appropriate. But it's completely inappropriate for this court to impose a 15-year sentence on a first-time offender who comes before the Court, at the age of 45, with no criminal history.

The legislature has said that the appropriate sentence for the most serious offense here, which is the stalking charge, is 41 to 54 months. That is more than adequate in this case. The aggravating factor here, in the grand scheme of things, I would submit is de minimus. The fact that the assault two occurred in the presence of his son and his daughter, that by itself is not a particularly unusual factor to justify going from -- just on that charge -- a 33- to 43-month standard range all the way up to 120 months, because he hit his wife in front of the children, I think is absurd.

The misdemeanors in this case are largely taken into account with the other charges. The misdemeanors in this case, the malicious mischief occurs immediately in the time after the assault. The interfering with 911 reporting actually occurs during the assault. The first

violation of a no contact order is taken into account with the stalking charge. The second violation of the no contact order is taken into account with both the felony harassment and the stalking charge. And -- oh, the other misdemeanor is the assault on Dylan, which, as I've argued, is largely encompassed in the aggravating factor. I suppose the fact that that involves a second victim is slightly different. But it occurs as part and parcel of the incidents of April 9.

And the standard range on Count 2, the assault two, 33 to 43 months, I believe encompasses the totality of the behavior on April 9. The standard range on the stalking charge, 41 to 54 months, encompasses the totality of the events from April 12 until May 19. And I would submit that the standard range is adequate in this case.

The -- we all learned on our first day of law school -- at least I did, and I assume Your Honor did -- that there are four reasons for the criminal justice system. One is rehabilitation. And I believe that Mr. McEvoy -- I think everyone agrees -- would benefit from alcohol treatment and mental health treatment. I'm not a psychologist. I'm not going to sit here and diagnose. But it appears to me -- and I've spent a lot of time with Mr. McEvoy. It appears to me he does suffer from at least depression, if not other issues.

The second reason is removing him from society. And that seems to be the State's primary focus here is that he just needs to be removed from society. I would submit that imposing a standard range of 41 to 54 months is sufficient to remove him, get some time and distance away from the -- from his wife, get the divorce finalized. I don't know if it came out in the evidence, but in my discovery in this case, I received a BOLO -- does the Court know what a BOLO is?

THE COURT: Uh-huh.

MR. WEAVER: I received the BOLO that was sent out as part of -- I think it went out on May 14, the day after the -- he missed court and the day after the phone call to Kara McEvoy. And it was done in -- with the marshal's office and the sheriff's office working together to try and find Mr. McEvoy. So they sent out a BOLO to all local law enforcement saying they're looking for Mr. McEvoy.

And what I thought was interesting about the BOLO is, they said that they -- that there is -- they believed that Kara McEvoy is in danger, and they believed that the threat against her is real. But they also said they don't believe that he has any threat -- that there's any threat to anyone else, that his anger was very directed at Kara McEvoy. And that's, I think, consistent

with all the evidence in the case. Thirty-three to -- I'm sorry -- 41 to 54 months I believe is sufficient for him to get some separation from Kara McEvoy, get the divorce final, for them both to start to move on with their lives.

Similarly, the reason for the criminal justice system is punishment. You know, the State is asking for 15 years on a first-time offender here. At what point are we going to say that punishment is enough? This was -- and I don't mean to minimize the behavior here. But for an Assault in the Second Degree, the injuries were relatively minor. They did not require any surgeries or substantial hospital stays, and no weapons were involved in the assault. Fifteen years, on a weaponless assault of this nature, I think is ridiculous and is not justified by the facts of this case.

And then, finally, of course, is the issue of deterrence. And the legislature has said that for these offenses, 41 to 54 months is adequate to deter people who might be inclined to engage in similar behavior.

There's a reason why we have standard ranges. I take issue with the State's statement that the standard range on the assault two is 33 to 120 months. That's just not the standard range. The standard range is 33 to 43 months. The aggravating factor here does not present substantial and compelling reasons to go above the

standard range. And I'm asking the Court to impose something within the standard range of 41 to 54 months.

I also would like to address the no contact orders. I understand that the State is going to ask for no contact orders. I assume they're going to ask for a ten-year no contact order on Kara. We have no objection to that.

Regarding the children, however, Mr. McEvoy, at some point in time, would like to repair his relationship with his children. He's going to be in prison now for a period of time. There is a count -- a fourth degree assault domestic violence involving Dylan McEvoy. I would ask the Court to impose a two-year no contact order with Dylan McEvoy. There are no offenses that cite Kaitlyn. And I would ask the Court not to impose a no contact order regarding her, keeping in mind that she's living with her mother and Mr. McEvoy is not going to be able to have contact with Kaitlyn in the immediate future. He's going to be in prison. She's going to be with her mother.

I am aware that Kara McEvoy has filed dissolution proceedings. She's asking for a parenting plan which basically gives her total control over the children. Mr. McEvoy has retained a lawyer on that. I've had some communication with the lawyer. There was a hearing last Friday that was continued because his lawyer

did not have enough time to adequately prepare. I don't know what's going to happen with that, but I do know that Mr. McEvoy very much loves his children. He talks about them frequently when we're in the jail. He would like to repair his relationship. He knows that what has happened here is a significant setback, and it's going to be a long time in order to repair his relationship with his children. A long-term no contact order does not facilitate that.

Dylan is 15 years old. The Court has seen Dylan on the stand. I've met with him now a couple other times as well. He's a pretty laid back kid. That's how he's described in the testimony, and that's been my observations as well. He will be 18 here soon. He will be an adult who can make his own decisions. I believe that the two-year no contact order is adequate to protect him and protect the State's interests in this case.

Finally, I do want to address, briefly, the issue that Ms. Lewis has brought up of the lack of remorse. Mr. McEvoy is a difficult person to read. As I've said, I've spent a lot of time with him in the jail, sat next to him for this three-week trial. I disagree, however, that he doesn't recognize that his behavior was wrong. He and I have talked a lot about that. His issue with this case has been -- well, there have been two major

issues. One is he vehemently denied the attempted rape, and the jury acquitted him of that. If the State had taken the attempted rape off the table, I think we could have gotten a lot closer to reaching a deal on this case. But they were -- they --

MS. LEWIS: Objection, Your Honor, as to plea negotiations.

THE COURT: I have to agree.

MR. WEAVER: Well, I guess my point here is that having that on the table, a deal was never going to be reached. And the jury acquitted him of that.

The second issue -- and the Court will probably hear from Mr. McEvoy on this -- is the State wanted an extraordinary amount of time on this.

MS. LEWIS: Again, objection, Your Honor.

MR. WEAVER: Well, they still do.

THE COURT: Sustained. I'll consider those things that are relevant for me to consider.

MR. WEAVER: They still want a whole bunch of time on him. And Mr. McEvoy recognizes his behavior is wrongful. The issue here is what is an appropriate sentence. The State and Mr. McEvoy and myself, we have been at odds on this case for three months on what an appropriate sentence is. And ultimately, we just threw up our hands and said, "We can't resolve it. You have to

decide it, Judge."

Mr. McEvoy knew he was going to be convicted of most of the offenses. We went into this trial knowing that. I think I conceded it in my opening. We knew that. Everything was about what's happening today, what is an appropriate sentence. The State and I and Mr. McEvoy, we could never reach a meeting of the minds. But to say that he has no remorse, and he doesn't recognize his own behavior, and he takes no responsibility is flat out wrong. He knew that what he was doing was wrong. But his mental state at the time was such that he, for whatever reason, continued to make bad judgment calls.

So I'm asking the Court to impose a standard range. I think it's what the legislature has authorized, and it's what's appropriate here. Thank you.

THE COURT: Thank you.

Mr. McEvoy, this is an opportunity for you to speak to me.

Do you wish to allocute?

THE DEFENDANT: I do.

THE COURT: All right. I would like to hear from you.

THE DEFENDANT: Well, first off, I would address my estranged wife and my kids and my family, my wife's family. And I would address Ms. Lewis and Mr. Bacus

there.

To make any statement that I have no remorse about what I did is absurd. Look at me here. I'm going to prison. I've ruined my life. I mean, this letter that I just read here from my own daughter, I can't even believe what it says, to be honest with you.

And I'm -- I'm going to try to -- this has adversely affected my mother, to say the least, my entire family. I'm sure it's affected my kids adversely, quite obviously, by reading that letter. You know, my son is 15 years old, is going to be 16. This happened at the worst time it could possibly happen. He should have a dad around. He doesn't.

Quite frankly, I consider myself to be an embarrassment. The words -- I'm ashamed of what I did. And I just didn't realize how effective I was at doing what I was doing. I was -- never had any intentions of harming Kara. I wanted her to feel like I felt, which was scared beyond belief. It's the first time in my entire life I've ever been scared. And I just didn't see any reason to stop being an idiot, because what difference did it make at that point in time? I had lost everything that I ever cared about.

At no point in time was I going to harm Kara, at no point in time. That was not my intention. You heard

testimony from Lieutenant Smith about how they kept her place of work under surveillance, about how they kept my home under surveillance, or our -- my former home, I guess, my kids' school under surveillance. They were driving around in her car, trying to -- and at no point in time did they ever see me. That might have led someone to believe that I wasn't trying to find her or track her down. That was never any -- anything I was going to do.

I -- you know, and I listened to that tape, that phone recording. It's, as I said, pitiful. I -- I don't even know what to say to that except that it's sad. That's not -- my behavior in those, after I guess it was April 9 through the 19th, when I was arrested, was nothing short of sad, ridiculous. And to say I have no remorse? I've destroyed my own life. How can I not have remorse for doing that? I've affected my wife. I mean, look at my mother-in-law looking at me like that. How could I not be affected by this? How could I not know it is completely my fault?

And Ms. Lewis mentioned several times about phone recordings. I guess she has selective memory. On many of the phone conversations I take responsibility. Who else's fault could it be besides mine? You know, I don't know how to even respond to that, it's so absurd.

And to say I was going to hurt Kara is

completely absurd as well. I never wanted to hurt her or harm her, take her life, or do anything like that. I simply was acting like a fool, who's heart was broken, and didn't -- I didn't know -- everything I did was wrong, basically. And I continued to be wrong the entire time.

And at no point in time was I ever -- or should ever -- I realize I'm going to be sent away. But I still wanted to, at some point in time, be able to speak to my own children, who I've never harmed in any way, shape, or form, other than that night seeing me act like a jerk. My kids mean -- I love them. The fact that I'm standing here, and my own wife submitted divorce papers with a 15-year-no contact -- I can't even believe it.

I mean, some of the things -- you know, just for some kind of -- a little bit of background. One of the things my mother asked me, when I was getting married, is why I married Kara or why I wanted to marry her. And my response to her was that she's one of the nicest people I've ever met. She would be number two behind my grandmother, who was never not nice to anybody at any point in time. And to see how little she wants to do with me, how much she hates me, wants me out of her life, to see how I've turned her to that is just -- speaks to how ridiculous my behavior has been.

I'm sorry for hurting my son, my daughter, my

wife, my entire family. Kara's entire family were worried about her. I caused everybody problems, quite obviously. I take full responsibility for that. To say I need 15 years to figure that out is -- I mean, there's a little bit of overzealousness on their part, to say the least. I don't know.

Again, the prosecutor's statements of I don't take responsibility for my actions are absurd. And to say it over and over is sickening for me to hear that. I'm well aware this entire issue is of my doing, mine, mine alone. I couldn't make it any clearer than that.

To -- you know, and I think everybody could agree that sometimes people say things they don't mean. I did a lot of that. I never -- any of the ridiculous comments I made, I never took any action to -- for them to come to fruition. Before April 9 I considered myself -- and I still can be a good person, productive member of society. I know I can -- I can be. But to think of that the prosecutors -- I don't know this. I'm just curious if Kara even knew they were going to ask -- asking to lock me up for 15 years and if even she thought that was appropriate. It amazes me that I could have turned someone who was such a nice person into hating me so much that -- I mean, I -- and again, that's -- again, that's my fault. I did it.

That's good. I guess I'm done.

THE COURT: All right. Is there anybody else here who wishes to speak? No response.

THE DEFENDANT: No response.

THE COURT: The standard ranges for the different crimes, I'll read them into the record.

For the Assault in the Second Degree is 33 to 43 months. For the Harassment felony charge, Count 2, it's 22 to 29 months. For the Assault in the Fourth Degree, a gross misdemeanor, it's zero to 364 days. For Interfering with Reporting Domestic Violence charge, zero to 364 days. For the Malicious Mischief in the Third Degree charge, zero to 364 days. For Count 7, Violation of a Court Order domestic violence, zero to 364 days. Count 8, Stalking, felony charge, 41 to 54 months. Count 9, Violation of a Court Order domestic violence, zero to 364 days. Count 10, felony Harassment, 22 to 29 months. Count 11, Attempting to Elude a Pursuing Police Vehicle, 12 months plus one day to 14 months. Count 12, Unlawful Possession of a Firearm in the Second Degree, 22 to 29 months.

If I followed the Defense recommendation, then the Defendant, with 50 percent good time, would be out of custody in two years and ten months, if I sentenced him to the maximum, 54 months, under the Stalking charge. Again, all sentences to run concurrent would mean he would be out

of custody in two years and ten months. The State seeks an exceptional sentence up from that calculation, making the statement that the standard range under the Stalking charge just simply isn't enough.

I do find and I do honor the jurors' aggravating circumstance that the children were present during the Assault in the Second Degree. And I do find that the standard range sentence does not accurately reflect the nature of the criminal conduct in which the Defendant engaged, so I will impose an exceptional sentence up.

Mr. McEvoy talks about wanting to repair a relationship with his children. And yet, he acknowledges that it was his own conduct that got him here. And it was his own conduct that puts him squarely in the cross hairs for an exceptional sentence up. The Court's responsibility is not to eke out society's anger. And I think that that should be made quite manifest. The Court's responsibility is to look at this case as a whole and to determine which of the principles underlying the Sentencing Reform Act should be fulfilled in this circumstance.

Along those lines, the Defendant presents as a former Marine, a decorated Marine. He was a sheriff's deputy for ten years. In his training as a former Marine and as a sheriff's deputy, he received specialized

training in subduing individuals and also in killing people. In that regard, he presents a heightened security risk for having committed crimes. Even though he claims his own intent was not to hurt anybody, the fact is that the ripple effect of his behavior endangered an entire community because of the nature of his training and experience.

There was a poignant moment, even during the testimony from Detective Menge, where she had been on the phone with the Defendant, who was inside of the hotel room, asking him to please come out because, as she described -- and I'm paraphrasing -- she didn't want it to go down like this; but that he knew what was happening on the outside. He, by his training, knew what the police officers were feeling, the fact that they were insecure about what he might do needed them to ramp up their own agitation and fear level to be able to protect the community around them. These are all facts that are in the record.

The Defendant, up to today, has steadfastly refused to take responsibility for any of the underlying acts. Today he accepted responsibility. But it isn't as much that conduct as it is his lack of insight into how the behaviors occurred and his lack of ability to stop the downward spiral, once it began, that concerns this court.

His motivation, as he described, was simply to scare his soon-to-be ex-wife. But what the behavior accomplished was much more than that, much, much more than that.

As he's described, it destroyed his family. It has left him vulnerable to spending much of the rest of his life in prison. It leaves his children without their father. It leaves his children with the knowledge that their father was capable of doing these things. It leaves a police force truly rocked by the fact that one of their own, someone that they worked with, could have put their own community in such danger and put themselves within the line of fire, as he had done, so much so that his conduct in eluding the police is now going to be used as a textbook case for the federal marshals. And yet, all he meant to do was to scare his wife.

It is the enormity of the effect of the conduct, Mr. McEvoy, that is the most troublesome for this court. The combination of the behaviors, of themselves, are taken into account with the standard range. But the long-reaching effects of your behavior needs to be acknowledged by this court.

Do you feel the need to say something because you disagree? Or you feel to -- the need to explain further?

THE DEFENDANT: I don't want to stop you when

you're going. I did feel --

THE COURT: You may speak.

THE DEFENDANT: Okay. There is potential in any situation. I don't know -- everybody is speaking of how I'm this danger to society and all these -- all this specialized training I have. Well, if I ever had any intention to use any of this, what stopped me, other than me? I didn't have the intention. By hearing everybody speak, I'm Rambo or something. It's -- I can't even -- well, then, if I'm such a lethal weapon, why didn't I do something, then? Why? Because I had no intention of doing anything. None. So if I had -- if that was my thought process, what would have stopped this lethal weapon from acting? That's -- that's what I'm -- how it could be used against me that I served honorably in the Marine Corps and served the citizens of Kitsap County for a decade, how that is all held against me, instead of for me, I'm not quite sure.

And at no point in time -- when Deputy Menge talked about I wouldn't walk out of the hotel I was in, I walked out, and there was never any issue. There was never -- I never exhibited any violence towards anybody in law enforcement. I did exactly what I was told. I didn't do anything to anybody. Who I assaulted was my wife, on April 9. Short of that, I never acted in any violent way

towards anybody, nor did I intend to. I'm not sure just because I was in the Marine Corps -- I was in the Marine Corps and worked for law enforcement that that makes me some sort of an evil person. I'm not -- I don't understand those lines. What kept me from doing something was me.

And, you know, I don't know what phone calls were given to you. But, obviously, they're very selective in what phone calls were given to you. Because on numerous times, I take full responsibility for what I did. Did you get the phone call I had last night? So, again, those were not my intentions, to harm anybody.

Thank you. I'll sit down and be quiet.

THE COURT: The Defendant -- Mr. McEvoy, your choices, in terms of what to say to me as a judge, are somewhat revealing, in terms of your -- what I would say continued lack of insight into the effects of your behaviors. If you -- and I don't know why there is any reason not to believe that what you say you intended is what you actually believe that you intended. However, a sentencing court doesn't just sentence a person based upon his recitation of his intent. A court who issues a sentencing has to take into account many other things and not least of which is the safety to the community.

It will be your challenge to learn why you did

the things you did, why you decided that it was worth this, sitting in a courtroom, with your future in the hands of a person that doesn't even know you. Because by your behavior, you have, in fact, gotten yourself into that chair. No one else caused any of this to occur. And I see you nodding, so I see that you acknowledge that.

But this could have been stopped long before it ever happened. And that's another problem that's been presented in this case. That you served in the Marine Corps as a decorated Marine is a good thing. It means that you were capable of doing something on behalf of the rest of us. You were willing to sacrifice your own life in order to be able to stand at the front line in the event of war. That you were a sheriff's deputy for such a long time with good service means a good thing. It means that you were willing to get out there and to pursue criminal conduct on our behalf, as our representative, in order to keep our community safe. That you allowed not only your honorable service in the Marine Corps, but also your honorable service in the sheriff's office to get to this point is your challenge to understand. But it is -- and as I said earlier -- it heightens the Court's concerns. Because a person who knows better should be able to reach out for help long before it gets to this point.

So given that, I believe that the standard sentencing range is simply not reflective of the criminal conduct, and it would not give honor to the jurors' findings of the exceptional sentence factor.

So here is my sentence. On the Assault in the Second Degree, I do find the aggravating factor, and I move the Defendant's sentence to the maximum, ten years in the state penitentiary, Counts 2 and 3.

MS. LEWIS: Your Honor, if I may interrupt for just a moment. The way I laid out the counts in my sentencing memorandum is not reflective of how they were charged. So Count 2 is actually the Assault in the Second Degree.

THE COURT: All right. Well, for the assault -- I'm going to -- I'll name them by the crime then.

For the Assault in the Second Degree, the penalty will be ten years. For the Harassment felony charge, the Unlawful Imprisonment domestic violence charge, the Harassment felony charge, the Unlawful Possession of a Firearm in the Second Degree charge, and the Attempting to Elude a Pursuing Police Vehicle, those charges will run concurrent to the Assault in the Second Degree charge. The Assault in the Second Degree charge will run consecutive to the Stalking charge, and I impose a high end, 54 months, of that standard range.

On each of the gross misdemeanor charges, the Defendant receives 364 days, and each of those charges will run consecutive to any of the other counts for a total of 1820 days, which is the equivalent of 60.66 months.

I will impose a lifetime no contact order between the Defendant and his family. If at some future time either of his children wishes to have that no contact order rescinded, then they will have an opportunity to seek that in front of the Court, but not less than five years. So the no contact order between his children and himself will last no less than five years, but the children, if they desire to have a relationship, can seek that on their own.

MR. WEAVER: Your Honor, I don't think the Court has jurisdiction to do that. I don't think the Court has jurisdiction to impose a lifetime no contact order. These are -- there's no Class A felonies here.

THE DEFENDANT: Bravo. Bravo. Bravo. This is awesome.

THE COURT: There is a remedy, Counsel. And if I'm wrong, the Court of Appeals will tell me what my jurisdiction is.

MR. WEAVER: I'm just saying that if there's no Class A felonies here, the Court does not have

jurisdiction to impose a lifetime no contact order.

MS. LEWIS: Your Honor, out of candor to the Court, I agree. I think the Court has --

THE COURT: Ten years?

MS. LEWIS: Ten years.

THE COURT: Then ten years it is. My intent would be for much longer, if I could.

THE DEFENDANT: Thanks.

THE COURT: That's contemptuous, Mr. McEvoy. You can always add on to the sentence, if you wish.

THE DEFENDANT: That's hard to believe.

THE COURT: All right. So during the period of community supervision, the Defendant will undergo an alcohol and drug evaluation to determine whether there is addiction present. If there is, I would like him to be treated. And if he has access to any mental health evaluations, I would prefer that that be done and that he seek the treatment that he needs, if treatment is recommended by the evaluators.

The total amount of time that I have imposed is 234 months .66, which is 19-and-a-half years.

MS. LEWIS: Your Honor, just as a clarification --

THE DEFENDANT: Unreal.

MS. LEWIS: Just as a clarification, for the

felony counts, other than the assault two and the stalking, are you imposing high end of the range on those?

THE COURT: Yes. But they're to run concurrent with the assault charge. The stalking is consecutive, but all the others are concurrent.

THE DEFENDANT: Nineteen years? Is that what I heard the total is? That seems fair.

You don't find that harsh for what I did? Not you. I don't care what you think.

Is that good to you, Dylan? Nineteen years?

MR. WEAVER: Your Honor, my client has declined to sign the domestic violence no contact order. I would just ask that he be orally advised of the contents.

THE COURT: All right. Mr. McEvoy, you do have the right to appeal.

THE DEFENDANT: Which I'll take full advantage of.

THE COURT: And so you have both the right to appeal the determination of guilt by the jury following the trial, as well as the sentencing determination which is outside the standard range. You will need to file the notice of appeal with the clerk within 30 days of today's date. If you don't do that, you'll lose the opportunity. So it must be done within the 30 days.

If you have no lawyer to file a notice for

you -- Mr. Weaver, are you going to do the notice?

MR. WEAVER: Your Honor, I will file the notice, and I will discuss with him what he wants to do regarding the indigency issues.

THE COURT: All right. If you want to have an attorney appointed for you on appeal, then you'll need to make sure that your attorney can produce an affidavit of indigency for this court, and I will appoint an attorney for you for appellate purposes. You will also have the right, at public expense, to have such portions of the trial record that are necessary for review to be transcribed for you at public expense.

If you wish to collaterally attack the judgment and sentence, you have to do that within one year or else that judgment and sentence will become valid on its face. Collateral attacks include such things as personal restraint petitions, habeas corpus petitions, motions to vacate the judgment, motions for new trial, and motions to arrest the judgment.

So I do see that there is a signature on this page purporting to be yours.

Did you sign it after reading it, Mr. McEvoy?

THE DEFENDANT: Which document are you referring to?

THE COURT: The notice of appeal.

THE DEFENDANT: I fully intend to file an appeal.

THE COURT: Okay. We also have a document called a domestic violence no contact order. This document protects Kara Jean McEvoy; DRM, whose birthday is December 19 of '98; as well as KMM, November 17 of '04.

The Court finds that the Defendant's relationship to the people protected by this order is that he is either a current or former spouse or other family or household members. It is ordered through this order that the Defendant is prohibited from causing or attempting to cause physical harm, bodily injury, assault, including sexual assault, and from molesting, harassing, threatening, or stalking the protected persons; coming near or having any contact whatsoever in person or through others by phone, mail, or any means, directly or indirectly, except for mailing or service of process of the court documents by a third party; entering or knowingly coming within or knowingly remaining within 500 feet of the protected person's residences, school, workplace daycare and other.

The Defendant has been convicted of owning, obtaining, possessing, or controlling a firearm.

It is further ordered that all previous domestic violence no contact orders under this cause number are

rescinded.

These are warnings to the Defendant. Violation of the provisions of this order, with actual notice of its terms, is a criminal offense under Chapter 26.50 of the RCWs and will subject the violator to arrest. Any assault, drive-by shooting, or reckless endangerment that is a violation of this order is a felony.

THE DEFENDANT: Oh, I didn't know that.

THE COURT: Willful violation of this order is punishable under RCW 26.50.110. Violation of this order is a gross misdemeanor, unless one of the following conditions apply. Any assault that is a violation of this order and that does not amount to assault in the first or second degree is a Class C felony. Any conduct in violation of this order that is reckless and creates a substantial risk of death or serious physical injury to another person is a Class C felony. A violation of this order is a Class C felony if the defendant has at least two previous convictions for violating a protection order, under Titles 10, 26, or 74. If the violation of the protective order involves travel across a state line or the boundary of a tribal jurisdiction or involves conduct within the special maritime and territorial jurisdiction of the US, which includes tribal lands, the Defendant may be subject to criminal prosecution in federal court.

In addition to the state and federal prohibitions against possessing a firearm, upon conviction of a felony or a qualifying misdemeanor, the Court, upon issuing a no contact order after hearing at which the Defendant has an opportunity to participate, the Defendant, if a spouse or former spouse or parent of a common child or current or former cohabitant as intimate partner of a person protected by this order, may not possess a firearm or ammunition for as long as the no contact order is in effect. A violation of this federal firearms law carries a maximum penalty of ten years in prison and a $250,000 fine.

If the Defendant is convicted of an offense of domestic violence, the defendant will be forbidden for life from possessing a firearm or ammunition.

You can be arrested even if the protected person invites or allows you to violate the order's prohibitions. You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the Court can change the order upon written application.

Pursuant to federal law, a court in any of the 50 states, the District of Columbia, Puerto Rico, any US territory, and any tribal land within the US, shall accord full faith and credit to the order.

I'm signing that with the notation that the

order was read in open court.

MS. LEWIS: So, Your Honor, Mr. Weaver and I were just going over the calculations again. My understanding is that you're imposing 234 months minus five days.

THE COURT: 234.66 months minus five days -- well, not minus because the maximum number of days I imposed was 1820 days. Divide that by 30, which is the number of months, and it's 60.66 months. That, added to the 120 months plus the 54 months under the standard range, is 234.66.

MR. WEAVER: I guess, Your Honor, I take issue with the Court's math, dividing by 30. I think the sentence of 364 days encompasses 12 months.

THE COURT: It's five years minus five days.

MR. WEAVER: So I -- what we've done is, we've taken 120 for the assault two, plus 54 for the stalking, plus 12, plus 12, plus 12, plus 12, plus 12, it equals 234 months minus five days.

THE COURT: All right. That's fine.

MR. BACUS: Your Honor, for the record, Mr. McEvoy has been provided a copy of the no contact order.

THE COURT: All right. I've signed the judgment and sentence and the warrant of commitment. Thank you.

We'll be at recess.

(Adjourned)

C E R T I F I C A T E

STATE OF WASHINGTON)
) ss.
COUNTY OF KITSAP)

I, Andrea Ramirez, an official court reporter for Kitsap County Superior Court, do hereby certify that the forgoing is a true and accurate transcript of the proceedings, as taken by me on October 13, 2014, in the matter of State of Washington v. Brian McEvoy.

_____

Andrea Ramirez, RPR, CRR, CCR #2293
Official Court Reporter

EXHIBIT C

(VRP Motion Hearing, January 27, 2017)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KITSAP

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	No. 14-1-00674-6
	)	COA No. 50026-4-II
vs.	)	
	)	
BRIAN McEVOY,	)	
	)	
Defendant.	)	

VERBATIM REPORT OF PROCEEDINGS
Motion Hearing

27 January 2017

Honorable Jeanette Dalton
Department No. 1
Kitsap County Superior Court

APPEARANCES

For the State: CAMI G. LEWIS
Deputy Prosecuting Attorney

For the Defendant: JOHN H. BROWNE
Law Offices of John Henry Browne, PS

The Defendant: Present

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Honorable Jeanette Dalton
State of Washington v. Brian McEvoy
14-1-00674-6

---ooOoo---

(Defendant present.)

THE CLERK: All rise.

The Superior Court for the State of Washington, in and for the County of Kitsap, is now in session.

The Honorable Jeanette Dalton presiding.

THE COURT: Mr. Browne, John Henry Browne. Mr. McEvoy.

MR. BROWNE: Hi. Good afternoon.

THE COURT: Hi.

MR. BROWNE: Nice to see you again.

THE COURT: You, too.

So we're here --

MR. BROWNE: Do you want me to call it?

THE COURT: -- following a mandate from the State Court of Appeals.

MR. BROWNE: Correct.

THE COURT: Which had, in its ruling, vacated the misdemeanor counts, I think, of Counts VIII and XI.

MR. BROWNE: That's correct.

THE COURT: So that would modify the total sentence. I have a proposed order from the prosecutor's

office.

MR. BROWNE: First of all, good afternoon again.

Mr. McEvoy is here despite the fact that he filed a waiver with the Department of Corrections. I did. And his counselor told me they weren't going to move him because it's going to be a pain for everyone. And I got a call from my staff -- or my staff got a call on Wednesday and said, they're moving him, so -- the Department of Corrections.

So Mr. McEvoy --

THE COURT: Over them I have no control.

MR. BROWNE: Yes, I know. But he was willing to waive his presence at this.

So I am going to make a sentence recommendation, however, because I talked to Rita Griffith, who's my, kind of, appellate guru and said, well -- because she worked on the case. And I said, well, I can ask for a sentence that I think is appropriate at this time. I don't have to agree to the 400 and -- 214 months, sorry -- and she said --

THE COURT: I don't -- I'm unaware of any case law that would indicate that I have any discretion to resentence him to anything other than what the mandate tells me to do.

MR. BROWNE: Well, the mandate, that's what's interesting, because the mandate says -- and I understand your argument, and so did Rita -- so, however, she said that because the mandate says a sentence consistent with this order, that's all it says. It doesn't say anything about the time.

So that's why she was saying that I could, and I will, briefly make an argument because the sentence that -- even the sentence of 214, which is lower than what you sentenced him to originally, is still four times the high end of the standard range. And the one I would propose was a hundred months, which is two times the end of the standard range, because there were aggravating factors found on two counts.

He was acquitted, you know, on the rape charge, and one count of violating a no contact order, which now wouldn't matter anyway.

So the highest ranking felony is stalking. I thought it was going to be Assault II, but it's actually stalking which is 41 to 54 months, the standard range. So assume we have a 9 because of all of these offenses, 54 months would be the high end of the standard range. So 214 months is about 24 times of that. And I'm recommending an exceptional sentence of 100 months, which is two times the standard range.

And I don't think I'll go on. You know the case fairly well, I'm sure. You were the trial judge.

THE COURT: Well, I do. But I'm -- I need to -- I would be more comfortable if I had a case that said that I -- because they didn't vacate the entire sentence.

MR. BROWNE: No.

THE COURT: All they did was vacate those two charges.

MR. BROWNE: Actually, what they said was they merged and --

THE COURT: Right.

MR. BROWNE: -- I assume, legally, we could do it either way by dismissing those two counts, which is what counsel proposes, which makes sense, or just putting on the record they run concurrently. But -- that wouldn't be right, that wouldn't be right. It would have to be vacated --

MS. LEWIS: Your Honor --

THE COURT: I'm just concerned --

MR. BROWNE: -- because they merge. And then the State agreed with that, by the way, that argument.

MS. LEWIS: Right. And, Your Honor, if I can just weigh in briefly --

THE COURT: Um-hmm.

MS. LEWIS: -- that the order from the Court of Appeals is that they vacated those convictions, so I think that decision has been made.

As far as resentencing, the sentence was not appealed.

THE COURT: Right.

MS. LEWIS: And so, from my position, that issue has been waived.

THE COURT: I don't know of any legal authority that would allow me to reopen the entire sentencing process to even reconsider whether the original sentence was too high or not. I mean, I just don't -- although I can always leave it up to you, Mr. --

MR. BROWNE: No, I was --

THE COURT: -- Browne, bringing up --

MR. BROWNE: -- just going to tell you what Rita -- I'm sorry.

THE COURT: -- a unique position. It's all right.

MR. BROWNE: I didn't mean to interrupt. I apologize.

Ms. Griffith, who we all know, I think, the position --

THE COURT: I know Rita real well, so --

MR. BROWNE: Her position was -- and I don't

expect you to just listen to me on that and then put it on the record, but because those two now vacated counts were part and parcel of what you were looking at as far as Mr. McEvoy's behavior, those two are not before -- I mean, they could be considered like 404(b) stuff or something or --

THE COURT: Oh, so you're thinking that I may have aggravated it --

MR. BROWNE: That's right. That's what she said.

THE COURT: -- based upon those two convictions --

MR. BROWNE: That's what she said.

THE COURT: -- and so, therefore, would give me an opportunity to reevaluate --

MR. BROWNE: That's what she said.

THE COURT: -- whether what remains --

MR. BROWNE: That's what she said.

And I will tell you, Rita couldn't think of a case off the top of her head, and she's a walking encyclopedia on the law.

THE COURT: I know.

MR. BROWNE: So that doesn't mean it goes down one way or the other. I just think an exceptional sentence, which is two times the high end of the standard

range is a lot of time. And you're correct, however, though, the sentence issue was not before the Court of Appeals.

THE COURT: Well, I'm looking back over the opinion.

MR. BROWNE: I have a copy here, if you want.

THE COURT: And I have it right here --

MR. BROWNE: Okay.

THE COURT: -- so --

MS. LEWIS: Your Honor, I guess, if I could, I might direct the Court to page -- it's essentially the end of the opinion, which is page 24 at the bottom on to 25, which just says resentencing consistent with this opinion.

THE COURT: And I know that. I am -- I hear the argument about whether the aggravation going above the standard range, whether I relied upon the no contact order convictions as an aggravating factor that I could consider without the jury's involvement. I don't remember that I did that.

MS. LEWIS: Well, I would hope that there were findings of fact for the exceptional sentence.

MR. BROWNE: That's -- I couldn't find any. But I wasn't the trial attorney, so --

MS. LEWIS: I don't know that the Court needed --

THE COURT: I did.

MS. LEWIS: -- a specific basis for the gross misdemeanors to run consecutively, because they're not governed by the SRA.

THE COURT: No. And that's always the case.

MS. LEWIS: Right. And so I think --

THE COURT: So running them consecutively has been taken care of by their vacation.

MS. LEWIS: Right.

THE COURT: That itself was a discretionary ruling I made and so that he's gotten the benefit of the discretionary -- he's gotten the benefit of --

MR. BROWNE: I know what you're saying.

THE COURT: -- a resentencing, if you will, by virtue of the fact that I can no longer run those charges consecutive.

MS. LEWIS: And if I do recall correctly, Your Honor, there were only a couple of aggravating factors that were alleged and proven. One of them was on the Assault II, which was that the victim's children were present.

THE COURT: The jury found those.

MS. LEWIS: Right.

MR. BROWNE: That's right.

MS. LEWIS: Right. And my recollection is

that's -- that's what the Court based the exceptional sentences on, so it ran the Assault II consecutively to top of the range on the stalking.

THE COURT: But I do want to make sure that I resolve this issue.

MR. BROWNE: There were two special allegations on Count II, the Assault in the Second Degree. One was the family member present, and the second was domestic violence.

THE COURT: Um-hmm.

MR. BROWNE: And I think, interestingly enough, Count III also has a special allegation on domestic violence. And Count IV has a special allegation of domestic violence. And Count V has a special allegation of domestic violence, which was contemporaneous assault on his son which the jury found him guilty of.

THE COURT: Um-hmm.

MR. BROWNE: And there's a special allegation on Count VI, which is the interfering with domestic violence report, malicious mischief. Special allegation domestic violence, Count VIII. Special allegation domestic violence, that's the violation of the court order, which I don't see -- well, it doesn't really matter intellectually, I think, because once the jury, I think, finds the special allegation, then that kind of frees the

Court. But I'm curious as to how special allegation domestic violence would apply to situations that didn't occur with his wife at the time or with the children present.

But it doesn't really matter because -- yeah, they charged on different dates felony stalking in Count X with a special allegation.

But as I say, I think, intellectually, it doesn't really matter because once the jury has found aggravating circumstances, you're pretty much free to do what you want.

So my argument, much more so, goes to what is an appropriate aggravating sentence now that we have two counts that have been disposed of. And I'm just -- it seems to me like two times the high end of the sentencing range, which is a lot of time.

Of course this was not a pleasant case for anybody to be involved in, by any means. But at the same time, I think you probably have done a lot more sentencings than I have at this point, and there's some -- because you're a judge, not because of your age -- so I think that -- I can't think of a case -- this is really a domestic violence situation gone crazy where somebody gets 20 years. That's pretty high.

THE COURT: Well, I'm looking at the sentence,

and the State's correct, I ran all of the felony convictions concurrent to one another. And then I used the aggravating factors that the jury found on the assault charge to make a finding that would justify an exceptional sentence on that charge alone and ran that charge consecutive. And so the --

MR. BROWNE: And you ran the misdemeanors.

THE COURT: I'm sorry?

MR. BROWNE: You ran the misdemeanors consecutive also.

THE COURT: Right.

MR. BROWNE: Which is interesting. Because now, under the way you wrote the sentence, he would have to serve three years consecutive in jail.

THE COURT: Um-hmm.

MR. BROWNE: Which you could have run concurrently with his DOC sentence, so that's just --

THE COURT: Um-hmm, I could have. Right.

MR. BROWNE: So I mean, I think counsel is correct in her calculation, if you followed your logic that you used originally -- which I'm not saying is appropriate or inappropriate, I'm just saying that we should probably consider other alternatives since two counts have been dismissed.

But 214 months is what counsel factors as the

sentence which would be consistent with what you did before. So her calculation of that is correct.

I've already made my argument on the other matters. It's -- you know, it's all discretionary, but -- I love that word sometimes because it means the other side of that is it has to be proportionate and it has to be -- it has to be -- and I don't know we answered counsel's question about whether there was special findings made by the Court in order to support the exceptional sentence. I have never found any, so --

THE COURT: Both the State and Defense filed a memorandum of authority at the time of the sentencing and --

MR. BROWNE: I actually saw those.

THE COURT: -- the minute entry does reflect the basis for my ruling.

MS. LEWIS: Your Honor, just to be clear on the record, too. Many of the charges that he was found guilty of do have that domestic violence special allegation, but they are not -- they're separate and apart from the second one that's added to the Assault II. So the fact that the children were present during that, that's what the basis for the exception was.

THE COURT: So I am -- so from a factual basis, an appeal was filed alleging a number of errors,

but there was not an assignment of error filed on the sentence itself.

MR. BROWNE: That's correct.

THE COURT: And so, therefore, if the Court had abused its discretion by running the Assault II charge consecutively to the other felony charges, the Defense had the ability at that point to appeal that decision if they felt that I was -- that I had abused my discretion.

The misdemeanor sentences were no -- were not a basis for the exceptional sentence -- for the exceptional sentence or aggravation in any way, except as to those misdemeanors.

And so the misdemeanors have been merged and those sentences vacated by the Court of Appeals. And so the use -- the discretion that I exercised at the time of the sentencing to run the two misdemeanors consecutive to the felonies has been addressed.

So your argument is moot by that issue, the fact that the Court of Appeals has taken care of it.

MR. BROWNE: Yeah, I understand what you're saying.

THE COURT: So -- excuse me.

MR. BROWNE: Computer issues?

THE COURT: I'm having issues.

(Off the record.)

THE COURT: So I do want to satisfy myself given those facts that there -- if the Court of Appeals was not asked to review the sentence itself, which it was not, there was no allegation of abuse of discretion, whether their ruling has somehow opened the door to a reconsideration of the initial sentence.

There are rules with respect to reconsideration under CR 59 and CR 60.

MR. BROWNE: Civil rules.

THE COURT: Right. If there's no rule --

MR. BROWNE: Right. I know.

THE COURT: -- that attaches to a criminal case, the criminal rules, and then you look at the civil rules. But that -- a lot of them contemplate what could have been done during an appeal.

So there's an issue of whether the defendant has waived any right to complain about the sentence by virtue of not appealing that to begin with. That's one issue I want to raise.

The second is whether, simply by virtue of the mandate, the Court of Appeals has reopened any other portion of the sentencing to reconsideration. My instinct is I doubt it. Because what you have just said was argued at the time of sentencing --

MR. BROWNE: You mean about the --

THE COURT: -- with respect to --

MR. BROWNE: -- proportionality issue?

THE COURT: Right. And there was a memorandum filed by the Defense, there were letters that were filed.

Now, proportionality is an issue with respect to abuse of discretion.

MR. BROWNE: Correct.

THE COURT: But there is no requirement on anything, other than a capital case, that the Court actually consider proportionality as a mandate.

MR. BROWNE: I believe you on that one. I'm not certain myself, but I believe --

THE COURT: But it can be -- it can be an indicator if the Court just went wild on it to argue that the Court has abused its discretion, which really is an argument that could be raised in the Court of Appeals.

So that's the issue that, I think, may preclude a reconsideration was that it was not appealed to begin with. And so there's a waiver, an implicit waiver of any right to complain about it now. But I also respect Rita Griffith and I am familiar with her ethics.

MR. BROWNE: Oh, yeah.

THE COURT: And she does not speak lightly or off the cuff.

MR. BROWNE: No.

THE COURT: So I want to satisfy myself that this is precluded. Because the State can also appeal --

MR. BROWNE: Sure.

THE COURT: -- if they believe that I am acting beyond my authority at this point. So that's why I need to take a look at it.

MR. BROWNE: And I think I did put on the record, because I want to protect Rita on that, in that she said that she didn't know that there was any case on point and her initial response was, well, it's -- if the Court of Appeals doesn't say send it back for 214 months, she thinks, theoretically, I can argue for a different sentence.

So that's what I'm doing. I'm doing what Rita told me. And I think she probably also said, No, I'm not sure about that.

MS. LEWIS: Your Honor, I did have a very brief conversation with John Cross from our office who is in our appellate division and he mentioned -- to be honest with you, I didn't listen specifically to what he was saying, but he was talking about how this issue about resentencing would not properly be before the Court. I'm certain that he has at his fingertips the appropriate rules and cases. If I could just see if he's available or --

THE COURT: Well, there is a -- there is a -- well, the federal court has time limitations a lot like our PRPs, within one year, if you don't raise the issue --

MS. LEWIS: Right.

THE COURT: -- you waive it. But we don't -- I know we don't. I just want to -- it shouldn't take a long time, but I do want to satisfy myself that the issue is not properly before the Court.

MR. BROWNE: Okay.

THE COURT: Okay. This is -- there are -- Mr. Cross is here.

MR. BROWNE: She's conferring with co-counsel.

THE COURT: Pardon?

MR. BROWNE: She's conferring with co-counsel.

THE COURT: I don't think that there is -- I know that there is no court rule that applies to this circumstance. The defendant does have the ability to make a motion to modify his sentence --

MR. BROWNE: Right.

THE COURT: -- under certain circumstances.

MR. BROWNE: Under Rule 8.6, I think.

THE COURT: Here's a case, *State vs. Shove*.

MR. BROWNE: C-h-o?

THE COURT: S-h-o-v-e.

MR. BROWNE: Okay.

THE COURT: The supreme court held that the trial court lacked authority to modify a sentence imposed under the Sentencing Reform Act and ordered release of the defendant after the defendant had served only 5 of 12 months originally imposed by declaring an exceptional sentence. And --

MR. BROWNE: So they said it wasn't timely?

THE COURT: No. The Court didn't have the authority.

And it also says, "Sentence under which defendant was ordered to serve 10 years of confinement with all of the terms suspended." This is an SRA sentence, so it was ripe when the transaction was occurring.

MR. BROWNE: That was my next question.

THE COURT: It says, "Sentence under which defendant was ordered to serve 10 years confinement with all of the terms suspended, except for the time of less than one year already served, violated the Sentencing Reform Act."

And then they go on to say --

MR. BROWNE: Well, that makes sense because it would turn it into an exceptional sentence probably, which it sounds like the Court didn't have authority to do that.

I think I know that case. Is it '80

something?

THE COURT: '89.

But the Court did say -- the trial court -- and I'm quoting, "the trial court lacked authority to modify sentence imposed under the SRA and ordered release of defendant after she had served 5 of 12 months by declaring an exceptional sentence changing the sentence to one of 10 years, suspending everything else."

Okay. I don't think I have the authority to do it and I'll get to the right section in the case, which is still good law.

"As is often true of dicta, it now appears that the *Bernhard* statement in question was ill-considered. The claim that the power to set a sentence carries with it the power later to modify that sentence ignores the importance of finality in rendered judgments. Final judgments in both criminal and civil cases may be vacated or altered only in limited circumstances where the interests of justice most urgently require."

MR. BROWNE: That's the Supreme Court?

THE COURT: CR 60(b). Supreme Court case.

MR. BROWNE: Supreme Court?

THE COURT: Um-hmm.

"Modification of a judgment is not appropriate

merely because it appears, wholly in retrospect, that a different decision might have been preferable."

MR. BROWNE: I think I'm familiar with that case.

THE COURT: "A principal purpose of the SRA is to establish guidelines for sentencing judges' discretion, thereby making the exercise of that discretion more principled and providing criteria for review by appellate courts." See Dave Boerner's articles.

MR. BROWNE: Yes. I was going to say something about that.

THE COURT: Who we also know.

MR. BROWNE: Yes. And he's still around.

THE COURT: The SRA structures the Court's discretion, so it's not unfettered.

Paragraph 3, quote, we hold that SRA sentences may be modified only if they meet the requirements of the SRA provisions relating directly to the modification of sentences. And so that is RCW 9.94A.260, I believe.

I'm going through the index of the SRA here to find the provision.

MR. BROWNE: About finality?

THE COURT: Modification.

MR. BROWNE: I don't think there's anything in the SRA about modification. I think it goes back to the

rules that you cited.

THE COURT: Well, there is an ability to modify if the defendant violates the terms or --

MR. BROWNE: Sure.

THE COURT: -- the conditions of the sentence.

MR. BROWNE: Of course.

THE COURT: Clemency. There's always --

MR. BROWNE: There's always that.

THE COURT: -- the ability to petition to the Board of Clemency.

MR. BROWNE: Always that.

THE COURT: Standard sentence ranges, revision to modifications. Oh, that's submission to the legislature. All right.

MS. LEWIS: Is the Court looking for the SRA for the modifications to the standard range? Because I think it's 505.

THE COURT: I'm trying to find it.

MS. LEWIS: It's 994A.505.

THE COURT: Let's see. The Court shall --

MS. LEWIS: Or 535.

MR. BROWNE: Sorry?

MS. LEWIS: 535. I believe it's one of those two.

THE COURT: Yeah, it's 535 is the exceptional.

MS. LEWIS: Okay.
THE COURT: So I'm just scrolling --
MR. BROWNE: Which is what we have.
THE COURT: -- down through 505.
MS. LEWIS: I think I may have just misquoted that. I think that's --
THE COURT: 505 is sentences in general.
MS. LEWIS: Oh.
THE COURT: Okay. Here's --
MR. BROWNE: So I guess the intellectual question at the moment is --
THE COURT: Here it is.
MR. BROWNE: Did you find it?
THE COURT: "Sentencing Reform Act permits modification of sentences only in specific, carefully delineated circumstances and only if they meet the requirements of the SRA provisions."
MS. LEWIS: 585 sets forth the process for appealing an exceptional sentence.
THE COURT: And then you get into the 2013 cases, Wendell -- *Wandell vs. State of Washington*. It reiterates again what the Court ruled in the *Shove* case. And so I'm just getting down to --
MR. BROWNE: Just --
THE COURT: -- okay 9.94A.010, et seq.

MR. BROWNE: Counsel, and I think the Court understand, that we understand that you do have the authority to impose an exceptional sentence based on the jury's findings.

THE COURT: Under 589 I did.

MR. BROWNE: Right, yep. So we're agreeing with that.

THE COURT: Right.

MR. BROWNE: So we're not appealing, nor would we have appealed, whether there's an aggravating factor or not that can be utilized by the Court.

I'm actually asking for a sentence that is exceptional.

THE COURT: Is 9.94A over there? Can you just hand it to me? We'll do it the old-fashioned way. 9.94A.010.

MR. BROWNE: Your Honor, may I just consult with my client for a second?

THE COURT: Sure.

(Off the record.)

THE COURT: Okay. There was a prior conviction that's later discovered and not found, and then the Court has the ability to modify. So you can resentence under that provision.

"If the calculation of the offender score was

wrong, the Court has the authority to modify and resentence. If the standard sentencing range exceeds the statutory maximum and the person got more than the maximum, the Court resentences."

I'm not seeing anything that would give me any authority.

The sentence is automatically appealable because it was outside the standard range. The Court had declared an exception. It could have been appealed. DOC has the authority to petition for review of the sentence, but the review -- here it is. Okay. "The review shall be limited to errors of law. And it has to be filed no later than 90 days after the Department has actual knowledge of the terms of the sentence."

MR. BROWNE: I'm not sure we're going to find anything in there that's going to answer that question affirmatively. I'll tell you what --

THE COURT: I think that, given the Court's rulings and my familiarity with CR 60, which, by the way, wouldn't justify in any of that review of the sentence or reconsideration of the sentence.

MR. BROWNE: Thank you.

THE COURT: Furthermore, it's been more than a year since he was sentenced. So he's limited.

But I don't see anything in the statute that

was cited by the Court that would give this Court any ability to reconsider the sentence that was imposed in the beginning, based upon only the vacation of the misdemeanors.

MR. BROWNE: It's really a nominal question, that's probably why Ms. Griffith was so candid with me when I was talking to her. Because you could look at this intellectually that there is no sentence at the moment because the total sentence was affected by what the Court of Appeals did.

THE COURT: Right.

MR. BROWNE: So I think that's what she was kind of musing on and thought it was pretty neat that I thought about that. But she had no help.

THE COURT: Right.

So with all due respect, Mr. Browne --

MR. BROWNE: I know you have that.

THE COURT: -- you've preserved the issue for an appeal --

MR. BROWNE: Right.

THE COURT: -- if you wish, but I am declining to reconsider Mr. McEvoy's original sentence.

MR. BROWNE: Okay.

THE COURT: And I will vacate the convictions -- or the sentence for Counts VIII and XI

since they merged, and so his sentence will be reduced accordingly.

MR. BROWNE: You're going to impose which sentence, Your Honor? I didn't hear.

THE COURT: 214 months.

MR. BROWNE: Okay.

THE COURT: And so I am signing the order that was prepared by the State which amends the judgment and sentencing for the case.

MS. LEWIS: Thank you.

MR. BROWNE: I signed it also.

Thank you.

THE COURT: And I appreciate it.

MR. BROWNE: And thank you for giving thought to us. I got some points for Ms. Rita Griffith because she thought it was a novel argument I was making, so --

THE COURT: Well --

MR. BROWNE: Normally she'll say yes or no.

THE COURT: -- you can tell her that her reputation has preceded her and it did give me some pause, so I wanted to satisfy --

MR. BROWNE: And she said --

THE COURT: I wanted to assure myself.

MR. BROWNE: She's thinking about retiring. I'll say hi to her.

THE COURT: Thank you. I appreciate it.

MR. BROWNE: Nice to see you.

MS. LEWIS: Thank you, Your Honor.

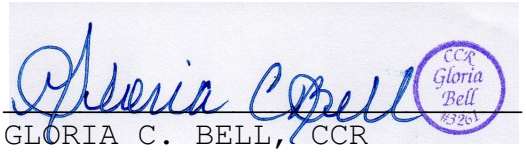
(Court proceedings concluded.)

C E R T I F I C A T E

STATE OF WASHINGTON)
) ss.
COUNTY OF KITSAP)

I, Gloria C. Bell, a certified court reporter, do hereby certify that the foregoing is a true and accurate transcript of the proceedings as taken by me in the above-entitled matter.

Dated this 15th day of April, 2017.



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LAW OFFICES OF JOHN HENRY BROWNE, P.S.

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